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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, individually and on behalf of all others similarly situated; and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,

Petitioners,

vs.

CITY OF DETROIT, a Michigan Municipal Corporation; COLEMAN A. YOUNG, Mayor; WILLIAM L. HART, Chief of Police; DETROIT BOARD OF POLICE COMMISSIONERS; and GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON, ALFRED BROOKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the use of a racial quota by a municipal government should be reviewed under a standard of "reasonableness" as opposed to the traditional strict scrutiny standard of review applicable to all governmentally imposed racial classifications?

2. Whether it is permissible for a municipal government to impose a 50/50 racial quota for promotions from police sergeant to lieutenant where a collectively bargained nondiscriminatory merit examination process is already in place?

3. Whether a municipal government may impose a racial quota for promotion to achieve a specified percentage of black lieutenants equivalent to the general population rather than reflecting the percentage of black employees who would have been hired and promoted in the absence of past discrimination as shown by relevant labor market statistics?

4. Whether a municipal government that has successfully eliminated all discriminatory employment practices must limit the use of racial preferences to benefit only actual victims of past discrimination, or is discrimination in favor of black employees justified to redress wrongs committed by the police force against black citizens many years earlier?

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 29, 1983 and issued as mandate on June 21, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), and is reproduced at pages 1-45a of the Appendix hereto. The consolidated Memorandum Opinion of the District Court is reported as *Baker v. City of Detroit,* 483 F. Supp. 930 (E.D. Mich. 1979), reproduced at pages 85-234a in the Appendix. The final opinion of the District Court is reported at 504 F. Supp. 841 (E.D. Mich. 1980), set out in the Appendix at pages 235-254a.

The opinion and order of the Court of Appeals denying the petition for rehearing *en banc* and vacating in part the final order of the District Court is reproduced at page 77a of the Appendix, with the separate dissenting opinion from the order denying rehearing *en banc* at page 79a.

JURISDICTION

The Court of Appeals decided and filed its opinion on March 29, 1983, and denied rehearing on June 3, 1983. By order of this Court entered by Justice White on August 8, 1983, the time for filing this petition was extended to and including October 1, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are the Equal Protection and Due Process clauses, which provide in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved include 42 U.S.C. § 1983, as well as sections 703(a), (h), and (j), of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §§ 2000e-2(a), (h), and (j) (1976) [hereinafter Title VII], providing in pertinent part:

> 42 U.S.C. § 1983
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 2000e-2
> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants from employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, ...

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of any intention to discriminate because of race . . . , nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . . .

(j) Nothing contained in this title shall be interpreted to require any employer . . . subject to this title to grant preferential treatment to any individual or to any group because of race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

STATEMENT OF THE CASE

A. Introduction.

The Police Department of the City of Detroit consists of patrolmen, sergeants, lieutenants, inspectors, commanders, deputy chiefs, and ultimately the Chief of Police who is appointed by the Mayor. As of 1973, and possibly as early as 1968, the mechanism governing promotions from sergeant to lieutenant (a combination of merit examination and seniority factors) had no disparate impact on blacks, *i.e.*, blacks were being promoted to lieutenants at rates at least equal to their representation among promotional candidates in the sergeants ranks. Although for many years under-represented in the Detroit police force, by 1974, in part as a result of affirmative action recruiting efforts that began in 1968, blacks constituted approximately 11% of the sergeant ranks.

In 1974, the newly elected administration of Mayor Coleman A. Young imposed a strict 50/50 racial quota on, *inter alia,* promotions from sergeant to lieutenant. By order of the courts below, this racial preference is to remain in effect at least until 1990, and possibly longer, in order to reach an ultimate goal of black representation among the lieutenant group that mirrors black representation in the city population.

As a result of this racial quota, the black promotion rate to lieutenant was in 1974 and continues to be several times the promotion rate that would be expected with a racially neutral system. Black sergeants with lower examination scores than white sergeants are promoted to lieutenant solely because half of the promotional opportunities have been guaranteed to blacks. Petitioners challenge the decision of the Court of Appeals, which sustained the 50/50 quota in its entirety.

B. Description of Parties.

Petitioners Bratton and other named individuals (Plaintiffs/Appellants below) represent a class of adversely affected

white male sergeants who, since November of 1975, have been or will be denied timely promotion to the rank of lieutenant solely because of their race. The Detroit Police Lieutenants & Sergeants Association is the exclusive bargaining agent and the signatory to the collective bargaining agreement with the City of Detroit, pursuant to the Michigan Public Employees Relations Act (PERA), Mich. Comp. Laws Ann. (MCLA) § 423.201, *et seq.*

Respondent Detroit Board of Police Commissioners (the "Board") is a five-member body appointed by the Mayor, Respondent Coleman A. Young. Under § 7-1103 of the Detroit City Charter, the Board establishes "policies, rules and regulations" for the Police Department "in consultation with" the Respondent Chief of Police, "with the approval of the Mayor." Respondent Guardians of Michigan is a minority organization which intervened as a Defendant shortly before trial.

C. Procedural History.

Petitioners commenced this action in a state circuit court in November, 1975. It was subsequently removed to federal district court pursuant to 28 U.S.C. § § 1441 and 1443. Interim injunctive relief was denied, and the quota has been applied throughout the litigation and continues to date.

As amended, the complaint alleges that the 50/50 racial quota for promotions from sergeant to lieutenant violates Title VII, 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution.[1] The district court upheld

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[1] Pendent state claims not addressed below include violations of § 7-1114 of the Detroit City Charter and the collective bargaining agreement requiring merit examinations for promotions, as well as violations of the Michigan Public Employees Relations Act (PERA), MCLA 423.201, et seq. PERA imposes the obligation of good faith bargaining on all promotion standards and criteria as a term and condition of employment. See, *Detroit Police Officers Ass'n v. City of Detroit,* 233 NW 2d 49 (1975).

the quota, and incorporated the program into its final judicial decree. *See* Appendix at 255-261a [hereinafter App.]. The Sixth Circuit affirmed on March 29, 1983. On April 28, 1983, the United States of America, through the Civil Rights Division of the Justice Department, sought leave to intervene as a party appellant and to file a suggestion of rehearing *en banc*. The motion was denied on May 27, 1983, with Judge Merritt dissenting. (App. 47-50a).

The Sixth Circuit denied Petitioner's Motion for Rehearing and suggestion of rehearing *en banc* per Order dated June 3, 1983. The Order also vacated that part of the district court's final Order incorporating the quota into a judicial decree, and remanded for further consideration of the 50% quota in view of the 1980 census showing a Detroit black population of 63%. (App. 78a). Circuit Judge Wellford filed a separate opinion dissenting from the denial of rehearing *en banc*. (App. 79a).

D. Facts and Background.

The 50/50 quota on promotions to lieutenant was adopted by the newly-appointed Board of Police Commissioners in June, 1974, as part of a plan designed to remedy the Police Department's prior discriminatory employment practices and to meet what the Board perceived to be an "operational need" for more black police officers and supervisors. The 50% figure was based upon the racial composition of the general population of the City of Detroit in 1974. Joint Appendix on Appeal to the Sixth Circuit at 1237 [hereinafter J.A.]. Under the plan, the Police Department allocates 50% of all promotions to black employees at every rank and level of the Department.[2]

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[2] In the 1973 Mayoral race, candidate Coleman A. Young campaigned on a pledge to the voters of proportional representation between the City's work force and the population. (J.A. 1088). Accordingly, when the Mayor took office in January of 1974, his Chief of Police adopted as a top priority the implementation of a 50/50 racial hiring and promotional policy. (J.A. 1124-25).

This case, however, involves only promotions from sergeant to lieutenant since November of 1975.[3]

Prior to the imposition of the racial quota, all sergeants who were candidates for promotion to lieutenant were ranked on a single list according to numerical ratings based on various performance evaluation factors, including individual exam scores, oral board scores, educational attainment, seniority, and other factors. (App. 152a). Promotions were made in rank order from the resulting eligibility list of candidates. While the Department did not keep statistics by race prior to 1973, the district court found that "there is no question, however, that the 1973 and 1974 promotional examinations were not themselves discriminatory." (App. 153a). At trial, experts for both sides agreed that the 1973 eligibility list was racially neutral, and that subsequent promotional exams and resulting eligibility lists did not have any disparate impact against black candidates.[4]

The Sixth Circuit's opinion describes the operation of the 50/50 racial quota as follows:

> The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternatively from

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[3] The issue of promotions from patrolman to sergeant is currently pending in the district court upon remand in the related case of *Detroit Police Officers Ass'n. v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). Unlike the facts here, *Young* involves an examination for promotions to sergeant which is alleged to have a disparate impact against blacks.

[4] The district court's conclusion that the pre-1973 promotional exams had a disparate impact on black candidates was inferred from the content of the pre-1973 written examinations. (App. 135–137a).

each list so that white and black officers are promoted in equal numbers. The 50/50 plan is to remain in effect until fifty percent of the lieutenant's corps is black, an event estimated to occur in 1990. (App. 4a).

Although the merit examination process was itself non-discriminatory, the 1975 Board cited the imbalance between the percentage of black police lieutenants as compared to the general population of the City of Detroit. The Board made no attempt to provide remedial relief on an individual basis, nor did it attempt to define the extent of such past discrimination through an analysis of the relevant labor market or labor pool, relying instead on general population figures to determine the 50% goal. (App. 25a). This effort to achieve a racial balance in the police department was acknowledged at trial by Chief of Police Hart, who conceded that the quota was not based upon particularized needs, but rather reflected "the mandate of the Mayor, the man in charge of the City." (J.A. 700).

The position of lieutenant is a specialized one, requiring several years of experience and well-developed skills. As a result, the relevant labor market is substantially narrower than the general population. At trial, the City's own expert[5] attempted to define the relevant labor market to determine racial disparities, if any, among the lieutenant ranks. (App. 139a). Based on an analysis of the relevant labor market as derived from a count of actual applications for employment with the Department, he estimated the number and percentage of black lieutenants that could have been expected in an environment free of discrimination in both hiring and promotions since 1945. As of June, 1978, his estimate was 49 black

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[5] Mr. Alan Fechter, who is incorrectly identified in the Court of Appeals opinion as "Appellants (Petitioners) own statistical expert, Mr. Alan Fechter". (App. 27a).

male lieutenants out of a total of 194 lieutenants, or 25%. (J.A. 1764). In fact, however, there were 41 black male lieutenants out of 194, or 21% by that date.[6] Fechter testified that this difference between the expected and actual number of black lieutenants in 1978 was not statistically significant. (J.A. 1044). The district court, however, concluded that this was a substantial difference justifying continued application of the quota well beyond 1978. (App. 143a).

The following table illustrates the increased numbers of blacks at every level of the Department since 1975. When the quota was implemented in November, 1975, blacks represented 22% of total department personnel and 6% of the lieutenant's ranks, down from 10% two months earlier (J.A. 1537) because a disproportionately high number of black lieutenants were appointed to the higher ranks of inspector and above (J.A. 1538).

Racial Breakdown of Police Command Officers[7]

	Lieutenants		Inspectors		Commanders & Above	
	White	Black	White	Black	White	Black
1975 —	195 (89%)	23 (11%)	47 (84%)	9 (16%)	14 (64%)	8 (36%)
1976 —	161 (90%)	18 (10%)	43 (74%)	15 (26%)	15 (58%)	11 (42%)
1977 —	176 (78%)	51 (22%)	43 (66%)	21 (32%)	17 (63%)	10 (37%)
1978 —	154 (78%)	44 (22%)	38 (60%)	24 (38%)	16 (53%)	13 (43%)
1979 —	145 (77%)	44 (23%)	35 (59%)	23 (39%)	16 (55%)	12 (41%)
1980 —	151 (73%)	56 (27%)	36 (58%)	25 (40%)	15 (54%)	12 (43%)
1981 —	145 (73%)	54 (27%)	32 (56%)	24 (42%)	15 (50%)	14 (47%)
1982 —	138 (72%)	53 (28%)	28 (54%)	23 (44%)	15 (54%)	12 (43%)
1983 —	145 (70%)	62 (30%)	34 (54%)	28 (44%)	16 (52%)	14 (45%)

[6] This 21% figure does not include seven additional black female lieutenants in June, 1978.

[7] Source: Updated statistics submitted by order to the Sixth Circuit. Discrepancies between the number of lieutenants above and those set out in the Sixth Circuit's opinion (App. 17a) are the result of the Court's inclusion of Hispanic and Asian officers as "white", which were deleted in

(footnotes continued on next page)

E. Decisions Below.

The district court found that the selection rates of the competitive merit examination process had no disparate impact against black candidates for promotion since such statistics were compiled starting in 1973. (App. 153a). It also found that the racial classification creating two separate lists for promotion "is unquestionably a racial preference and unquestionably impacts against white officers." (App. 185a).

Nonetheless, it concluded that the City "acted reasonably when it adopted its affirmative action plan." *Id.* Extending its interpretation of *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979) to the case of a public employer (App. 201a), the district court held that a broad "area of discretion" exists for employers to design and implement "voluntary" affirmative action programs. (App. 192a). The district court then concluded that the promotion quota was a "reasonable" effort to remedy the present effects of the City's past intentional employment discrimination, which did not cease until 1967-1968, when an affirmative action minority recruitment program was instituted by the Department. (App. 210-211a).[8]

The Sixth Circuit affirmed. Noting that "what is valid under [the Fourteenth Amendment] will certainly pass muster under Title VII" (App. 13a), the Sixth Circuit's analysis focused solely on the constitutionality of the Board's 50/50 promotion quota. The Court of Appeals considered itself bound by *Detroit Police Officers Ass'n v. Young, supra,* which dealt with a similar 50/50 quota on promotions from patrolman to

(footnotes continued from previous page)

the table above. These statistics are on file with the Detroit Police Department Statistical Section, and are published yearly in the Detroit Police Department Annual Report.

[8] The court also based its holding on Respondents' contention that the Department's "operational needs" justified imposition of the promotional quota for lieutenants. (App. 226-229a). In a separate final opinion,

(footnote continued on next page)

sergeant. (App. 10a, n. 26). The court relied on *Young's* "reasonableness" standard which, according to the Sixth Circuit, requires an examination of whether any discrete group or individual is stigmatized by the racial classification and whether racial classifications have been "reasonably used in light of the program's remedial objectives." (App. 13a, 20a). Applying this standard to the instant case, the Court of Appeals concluded that the 50/50 quota (1) did not unduly stigmatize anyone (App. 20a-23a), and (2) passed the "test of reasonableness." (App. 23a). The court found it "unnecessary to address the validity of the operational needs defense to affirmative action in this context." (App. 12a n. 30).

The Court of Appeals held that to the extent to which the 50/50 quota is excessive as a remedy for past discrimination in employment, it can be justified due to a prior "pattern of unconstitutional deprivation of the rights of a specific, identifiable segment of the Detroit population by white members of the segregated Police Department," and concluded that the "redress of this injury to the black population as a whole justifies a plan which goes beyond the. . . work force limitation which appellants imply may have been appropriate." (App. 31a). Judge Merritt, dissenting in part, argued that "the Fourteenth Amendment requires a more exacting standard than the open-ended mere 'reasonableness' stated by the Court." (App. 45a).

In its order denying rehearing, the court vacated that part of the district court's final order holding that the quota was constitutionally required at the 50% level, and remanded for reconsideration of the quota in light of the 1980 census showing a black City population of 63%. (App. 79a). Circuit Judge

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(footnote continued from previous page)

the district court incorporated the Board's promotional quota for lieutenants into a final and mandatory judicial decree, holding that the quota was constitutionally required until the 50% black end-goal was achieved. (App. 255a-261a).

Wellford filed a separate opinion dissenting from the denial of rehearing *en banc*, expressing his view that the court "inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool." (App. 79a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS PERVASIVE ISSUES OF VITAL NATIONAL CONCERN RELATING TO RACIAL PREFERENCES IN PUBLIC EMPLOYMENT.

Although there is substantial litigation in the area of municipally imposed racial preferences in public employment,[9] this Court has dealt only peripherally with these issues in three principal cases: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber, supra*; and *Fullilove v. Klutznik*, 448 U.S. 448 (1980). None of these cases directly addresses the pervasive issue of the applicable parameters of municipal discretion to impose racial quotas to remedy perceived past discrimination.

The U.S. Civil Rights Commission has singled out the issue of municipal authority to impose racial quotas in public employment as a principal unanswered question in affirmative action law, *see* U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 28 (1981), and has cited the district court opinion in the instant case as expressing the applicable state of the law on these issues. U.S. Commission on Civil Rights, *The State of Civil Rights: 1979* 22-24 (1980). The Attorney General has certified "that the United States has determined this case to be of general public importance." (App. 46a).

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[9] *See, e.g.*, B. Sch'lei and P. Grossman, *Employment Discrimination Law* 775-870 (2d ed. 1983).

Racial preferences, particularly in promotions, substantially impact individual citizens. Unbridled racial quotas foster community divisiveness, with minority individuals,[10] whether beneficiaries or not, bearing the stigma of the unearned,[11] and innocent nonminority individuals harboring sustained resentment.[12] A resolution of the issues in this case will thus impact not only the parties herein, but also "the broader question of race relations in the City of Detroit and throughout the United States." (App. 88a).

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[10] The use of the term "minority" here is generic rather than descriptive. Blacks presently constitute a majority of the Detroit population, and for nearly a decade have controlled the political apparatus which produced and maintains the quota.

[11] Several outstanding black scholars have delivered strong indictments against governmentally imposed racial preferences and so-called "benign" discrimination. *See, e.g.*, A. Wortham, *The Other Side of Racism* (1981); T. Sowell, *Dissenting from Liberal Orthodoxy* (1976); W. Williams, *America: A Minority Viewpoint* (1982); and S. Brown, *Court-Ordered Racial Discrimination in "America's Finest City,"* 3 Lincoln Rev. 9 (1983).

[12] A 1981 comparative study reveals that white police attitudes in Detroit have deteriorated markedly since the imposition of racial quotas. Faced with limited promotional opportunities and "alienated from the political structure," 21% of the white police officers left the Department in the four year period between 1974-78, which the author characterized as a "massive turnover" of white police officers on the force. This situation is contrasted with Oakland, which does not utilize racial quotas and where white police attitudes are demonstrably better. Buzawa, *The Role of Race in Predicting Job Attitudes of Patrol Officer*, 9 J. Crim, Just. 63 (1981).

II. JUDICIAL REVIEW OF GOVERNMENTALLY IMPOSED RACIAL PREFERENCES IS CHARACTERIZED BY CONFUSION AND CONFLICT.

No decision of this Court has established parameters in the myriad circumstances in which municipalities enact affirmative action plans. *Stotts v. Memphis Fire Dept.* (No. 82-229), 679 F.2d 541 (6th Cir. 1982), *cert. granted* — U.S. — , 51 U.S.L.W. 3871 (1983), will provide an opportunity to adjudge the authority of a federal court under Title VII to require racially preferential employee layoffs, but will leave unaddressed the constitutionality of racial promotional quotas established by municipalities purportedly seeking to remedy their own past discrimination.

This Court has never issued a majority opinion setting out the constitutional standard for reviewing racial quotas or preferences under the Equal Protection Clause. Consequently, the circuits have expressed confusion in determining proper standards in such cases.[13] The Sixth Circuit below noted the "inherent uncertainty of the law in this area" (App. 36a) and rendered its decision despite a perceived absence of agreement within this Court "on the nature of the governmental interest which must be at stake, on the finding necessary to establish the presence of that interest [and] on the standard under which the method employed to achieve that interest is to be reviewed." (App. 9a). Similarly, the Fifth Circuit, citing *Bakke,* complained that "the Justices have told us mainly that

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[13] This confusion is illustrated in *Williams v. City of New Orleans*, in which the district court denied a consent decree incorporating racial promotion quotas, 543 F. Supp. 662 (E.D. La. 1982), which denial was reversed and remanded on appeal, 694 F.2d 987 (5th Cir. 1982), and which mandate was dissolved and rehearing *en banc* granted, 694 F.2d 998 (5th Cir. 1983).

they agree to disagree." *U.S. v. City of Miami,* 614 F.2d 1322, 1337 (5th Cir. 1980). *Accord generally, e.g., Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir. 1981); *Parker v. Baltimore and Ohio Railroad Co.,* 652 F.2d 1012, 1020 (D.C. Cir. 1981). As a result, conflicts among the circuits on issues presented in this case are plentiful, including the following:

A. *Promotion quotas.* The circuits disagree on the propriety of imposing racial quotas for promotions. The Fourth Circuit, in reversing a public employment promotion quota, noted that the relevant labor market for promotions is not the pool of potential employment applicants, but rather the smaller pool of experienced, qualified employees. *Hill v. Western Electric Co.,* 596 F.2d 99, 105-06 (4th Cir. 1979). And the Second Circuit, recognizing important differences between hiring and promotion quotas in terms of the degree of injuries suffered by innocent persons, reversed such a quota in *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 429 (2d Cir. 1975). The reasoning of the Second Circuit was specifically rejected by the trial court below (App. 195-96a) in upholding Respondents' 50/50 promotion quota. Other circuits have joined the Sixth Circuit in sustaining promotion quotas. *See E.E.O.C. v. American Telephone and Telegraph Co.,* 556 F.2d 167 (3d Cir. 1977): *U.S. v. City of Chicago,* 549 F.2d 415 (7th Cir. 1977); *Firefighters Institute for Racial Equality v. City of St. Louis,* 616 F.2d 350 (8th Cir. 1980).

B. *Less harmful alternatives.* In *Sledge v. J.P. Stevens & Co.,* 585 F.2d 625, 646-47 (4th Cir. 1978), the court reversed a remedial decree requiring hiring quotas, noting the existence of less burdensome means to achieve equal employment opportunity. The Fifth Circuit in *NAACP v. Allen,* 493 F.2d 614, 621 (5th Cir. 1974) instructed that quotas may be imposed only where less burdensome alternatives have failed. *Contrast* the instant case, in which a rigid 50/50 promotion quota was

superimposed on existing hiring quotas and admittedly nondiscriminatory promotion procedures which provided equal opportunity based on merit. While conceding that the 50/50 ratio "is unquestionably a racial preference and it unquestionably impacts against white officers," (App. 185a), the trial court made no finding that less harmful alternatives had failed to provide equal opportunity or were inadequate to remove the vestiges of past discrimination over time.

C. *Duration.* The Fifth Circuit in *NAACP v. Allen*, 493 F.2d at 621, admonished that in the narrow circumstances in which a quota is justified, it should seek "to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate." *Accord,* Equal Employment Opportunity Commission, *Eliminating Discrimination in Employment: A Compelling National Priority* III-3 (1979). And the Seventh Circuit recognized that failure to modify or eliminate racial quotas where they are no longer justified results in "unfairness to innocent individuals." *U.S. v. City of Chicago,* 663 F. 2d 1354, 1361 (7th Cir. 1981). The Sixth Circuit below, while terming the quota "temporary," upheld a program which will operate for at least sixteen years and not spend itself until a balance in the lieutenants' ranks consistent with the general population is reached. Given the City's goal of racial balancing, along with rapidly changing demographic patterns, it is clear that the quota cannot be fairly characterized as temporary in nature.[14]

These conflicts among the circuits are central to the question of the extent to which municipalities may offend the rights of innocent nonminority individuals in ostensibly remedying past discrimination, and thus commend themselves to this Court for resolution.

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[14] The Court noted that the 1980 census reveals that the black population is now 63% (App. 25a, n.41), and remanded the case to the district court in light of the new census figures. (App. 78a).

III. THE DECISIONS BELOW CONFLICT IN PRINCIPLE WITH *BAKKE*, *WEBER* AND *FULLILOVE* AND SQUARELY COLLIDE WITH THE PRINCIPLE THAT THE NATURE OF THE VIOLATION MUST DETERMINE THE SCOPE OF THE REMEDY.

The Sixth Circuit sustained a sweeping 50/50 quota which places within the municipal "area of discretion" (App. 192a) the power to use racial preferences much broader than those conferred under the remedial provisions of Title VII and the permissible parameters of the Equal Protection Clause. If the ruling below is not disturbed, major cities throughout the country will, like Detroit, have (a) the power to impose class-based racial preferences without regard to whether the beneficiaries are actual victims of past discriminatory practices; (b) the ability to impose racial preferences on a racially neutral merit and seniority system which would otherwise be protected under § 703 (h) of Title VII; and (c) the ability to disregard procedural safeguard requirements for the protection of individual rights and to distort the collective bargaining system.

The result below contradicts the teachings of this Court, which although not fully dispositive of all the issues presented herein,[15] nonetheless offer sound general principles with which the decisions below conflict. The most obvious and fundamental departure from established constitutional principles

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[15] *Weber* and *Fullilove* are distinguishable in important respects. For example, *Weber* was limited in scope to a private, collectively bargained plan which the Court emphasized did not implicate the Fourteenth Amendment since no state action was involved, 443 US at 200; while *Fullilove* involved an act of Congress, with broad, constitutionally derived powers which provide unique authority to remedy past discrimination based on carefully developed findings of fact. 448 US at 472-80.

is the standard of review adopted by the Sixth Circuit. In *Bakke, supra,* Justice Powell, announcing the judgment of the Court, clearly articulated the traditional "strict scrutiny" standard of review applicable to all governmentally imposed racial classifications:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. 438 US at 289-91.

Maintaining that "the Supreme Court has failed to set out a binding standard" (App. 10-11a, n. 26), the Sixth Circuit below flatly rejected strict scrutiny, choosing instead a "reasonableness" standard, holding that:

> One analysis is required when those for whose benefit the Constitution was amended . . . claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. (App. 11a).

Petitioners submit that this revisionist interpretation of the Fourteenth Amendment not only dictated the result in the instant case, but also creates an alarming precedent by discarding the vital principle that "if both are not accorded the same protection, then it is not equal. *Bakke,* 438 US at 290.

Announcing the judgment of the Court in *Fullilove, supra,* Chief Justice Burger confirmed that any "preferences based on racial or ethnic criteria must necessarily receive a most searching examination . . . " 448 US at 491; and Justices Stewart, Rehnquist and Stevens clearly articulated the traditional strict scrutiny standard in separate dissenting opinions. *Fullilove,* 448 US at 526, 537. The Sixth Circuit disregarded *Fullilove,* terming it "a plurality decision with little precedential value." (App. 10a). Instead, the Court below explicitly

embraced concurring and dissenting opinions in *Bakke* and *Fullilove* to ascertain applicable constitutional standards. (App. 10a).

As applied below, this standard of "reasonableness" permits the duration of the racial quota to be linked to achieving racial parity with the general population rather than the relevant labor market of qualified "minority members who would have been employed (and promoted) by the governmental institution in question in the absence of discrimination." (Merritt, dissenting, App. 45a). While purporting to apply the teachings of *Weber*, the Sixth Circuit remanded for reconsideration of the 50% quota in view of the general population figure of 63% in the 1980 census. (App. 78a). This contrasts sharply with *Weber*, wherein preferential selection of craft trainees terminates as soon as the percentage of skilled black craft-workers approximates the number of minorities in the relevant labor market. 443 US at 209. Indeed, in a separate opinion dissenting from the denial of rehearing *en banc*, Circuit Judge Wellford emphasized "that the District Court, in approving the affirmative action program in question, inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool." (App. 79a).[16]

This Court has specifically noted the limited probative value of general population figures where the population at large does not possess the requisite qualifications for the job in question. *Hazelwood School District v. United States*, 433 US 299

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[16] This difference is substantial. Although the general population was 50% black in 1974, the City's relevant labor market expert estimated that absent discrimination there should have been 43 black lieutenants in 1974 out of a total of 232 lieutenants, a ratio of only 19%. The Court of Appeals does not mention this finding, but compare the number of lieutenants in the table in the opinion at App. 17a with the district court's findings at App. 143a.

(1977); *Int'l Brotherhood of Teamsters v. United States,* 431 US 324, 399 (1977). As the Court stated in *Hazelwood,*

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. 433 US at 308, n. 13.

The Sixth Circuit flatly misconstrued *Hazelwood,* concluding without any qualification that "[t]he Supreme Court has approved the use of racial composition comparisons between employers work forces and general area-wide population as probative of discrimination in employment discrimination cases . . ." (App. 32a). This misconstruction of *Hazelwood* permitted the Sixth Circuit to sustain the Board's use of general population figures in fashioning its 50/50 quota, noting with approval that the Board in choosing this figure had "simply concluded that *most police officers in the past had come from within the City and that the City was now approximately fifty percent black.*" (App. 25a, emphasis in original).[17]

As Justice Powell made clear in *Bakke,* 438 U.S. at 307, the goal of achieving "some specified percentage of a particular group merely because of its race or ethnic origin" is not constitutionally permissible and constitutes discrimination for its own sake. This Court has emphasized that there is neither a constitutional necessity nor right to create balances, *Milliken v. Bradley,* 418 US 717, 740-741 (1974), and the goal of racial balancing as a remedy has been specifically rejected by the Court. See *Swann v. Charlotte-Mecklenberg Bd. of Education,* 402 US 1, 24 (1971). On the contrary, where past discrimination is to be remedied, "the nature of the violation determines the scope of the remedy." *Id* at 16.

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[17] It seems obvious that a police force of mostly thirty-year career officers cannot possibly keep pace with rapidly changing demographics that went from 16% black in 1950 to 63% black in 1980.

Instead of determining whether the racial preferences were "precisely tailored" to remedy past discrimination, the Sixth Circuit embraced the use of a racial quota as a form of "redress . . . to the black population as a whole." (App. 31a). Referring specifically to past discrimination in *employment*, the Sixth Circuit held that "we do not believe that marginally increasing the percentage of black lieutenants *above the figure that would exist had hiring been non-discriminatory* is an unreasonable remedy for redressing this wrong." (*Id,* emphasis added).

No authority is cited for this "redress" rationale, which conflicts with established case law. Such "cumulative" remedies were specifically rejected in *Dayton Bd. of Educ. v. Brinkman,* 433 US 406 (1977), in which the Court instructed that race-conscious remedies may only be designed to redress the difference between the *status quo* and that which would exist absent past discrimination, based on specific fact findings.

A permissible remedy must be carefully designed to correct past discrimination with due regard for the individuals adversely affected by the remedy. Accordingly, when racial classifications impinge upon individual rights, the individual is entitled to a "determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke,* 438 US at 299. In *Fullilove,* this requirement was satisfied by the existence of procedural safeguards insuring that "the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process." 448 US at 489. *Contrast* the instant case, in which the courts below sustained the abrogation of existing procedural safeguards specified in § 7-1114 of the Detroit City Charter, providing that "any person having been passed over (for promotion) may appeal to the Board." (J.A. 1519). The district court brushed aside the lack of procedural due process in the

Board's systematic denial of a hearing to individual victims of the racial preferences, declaring that:

> [t]he purpose of individual appeals is to hear individual grievances. The white officers who were bypassed by affirmative action were complaining about Board Policy, not an injustice unique to them as individuals. (App. 218a).

The quota thus contains no procedural safeguards to insure that beneficiaries are victims of past discrimination, nor does it preclude unjust penalization of innocent individuals.[18] As a result, the Sixth Circuit, in sustaining this class-based quota, effectively rejected Chief Justice Burger's warning against any "program which seeks to confer a preferred status upon a non-disadvantaged minority," *Fullilove*, 448 US at 485; as well as the requirement that race-conscious affirmative action programs must be carefully tailored so that they do not "stray from narrow remedial justifications." *Id* at 487.

This Court has specifically noted that the "principal focus" of Title VII "is the protection of the individual employee, rather than . . . the minority group as a whole." *Connecticut v. Teal*, 457 US 440, 453-54 (1982), and that remedial efforts must be "necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied absent such conduct." *Milliken v. Bradley*, 418 US at 746. Indeed, Title VII expressly prohibits courts from ordering specific affirmative relief for persons who were not actual

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[18] One individual member of the Plaintiff class observed over a period of time several individual black sergeants who were first promoted to lieutenant ahead of him, and who were later promoted to inspector. (J.A. 236). At the same time, other individuals were passed over for promotion not once, but two or three times. (J.A. 65).

victims of past discrimination. *Franks v. Bowman Transportation Co.*, 424 US 747, 774 (1976).[19]

As a class-based "remedy" the 50/50 quota inherently favors some persons who have never been hindered by discriminatory employment practices,[20] yet these same individuals are preferred over other individuals in the context of a merit examination that otherwise provides an equal opportunity for each candidate to compete for promotion. This equality of opportunity is consistent with equal protection, "for once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution." *NAACP v. Allen,* 493 F 2d 614, 621 (5th Cir, 1974).

On this point, the E.E.O.C. instructs that the proper purpose of an affirmative action program "*is to overcome previous exclusion,* rather than merely to achieve numerical 'parity.'" E.E.O.C., *Eliminating Discrimination in Employment, supra,* at III-3 (emphasis in original). The Civil Rights Commission warns further that race-balancing quotas improperly change "the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities."

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[19] The district court claimed that identification of actual victims of discrimination is impossible in the instant case (App. 155a), yet proceeded to illustrate several particular cases in point, demonstrating that said efforts are indeed feasible. (156a).

[20] To the contrary, some individual beneficiaries of the lieutenants quota also benefitted from the same preference in promotions from patrolman to sergeant. (J.A. 1661, 1686, 1871).

U.S. Commission on Civil Rights, *Affirmative Action in the 1980's, supra,* at 31.[21]

Finally, while the Sixth Circuit purports to apply the teachings of *Weber,* it glosses over the role of the collective bargaining agreement which constituted the voluntary affirmative action plan upheld in that case. *See,* 443 US at 197. The instant case, conversely, involves a racial quota for promotions unilaterally imposed on a bona fide equal opportunity merit system in derogation of the state law obligation to bargain, and which includes procedural safeguards of the type described in *Fullilove.*[22]

The decision below therefore conflicts with important constitutional principles as well as statutory parameters beyond which racial quotas may not be considered "benign" in any real sense. Yet, in the absence of definitive guidance from this Court, the decisions below are necessarily viewed as the state of the law on these issues.[23] It is therefore vital that this Court review the statements of law decided below.

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[21] This Court has recognized that Congress, in § 703(h) of Title VII, specifically intended to protect seniority systems from being distorted by racial preferences. *See, Int'l Brotherhood of Teamsters v. United States,* 431 US 324 (1977). On its face, § 703(h) also protects "professionally developed" merit systems such as the promotional process in the instant case. 42 USC § 2000e-2(h).

[22] Unlike *Fullilove,* which involved an Act of Congress based on broad constitutionally derived powers, the City of Detroit is a public entity incompetent to make unilateral decisions regarding police promotions under the collective bargaining requirements of Michigan law (*see,* PERA, supra, n.1). And unlike the carefully developed findings of fact in *Fullilove,* 448 US at 472-80, the Board's "fact findings" were limited to one public meeting and no formalized findings of past discrimination. (J.A. 1129-31).

[23] *See, e.g.* Schlei & Grossman, *Employment Discrimination Law,* 854-62 (2d ed 1983).

IV. THE CASE IS RIPE FOR REVIEW AND PRESENTS A FULLY DEVELOPED RECORD FOR THIS COURT TO DECIDE APPROPRIATE STANDARDS FOR THE REMEDIAL USE OF RACIAL PREFERENCES IN PUBLIC EMPLOYMENT.

In contrast to the unsettled records and procedural problems in other similar cases that have come before this Court,[24] this case presents to the Court a final Court of Appeals decision based on a fully developed record. Issues fully developed in the record evidence include:

(1) a comprehensive relevant labor market analysis derived from a laborious count of actual applications for employment with the Department over a three-year period, 1971-1973;

(2) an analysis of the competitive merit selection examination process, with findings on the selection rates of that process concurred in by experts for both sides;

(3) a detailed history of the affirmative action effort in the Department commencing in 1967 with special recruitment efforts and the elimination of disproportionate standards, and progressing through the use of racial preferences for hiring and, finally, in promotions;

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[24] For example, in *Minnick v. California Department of Corrections*, 452 US 105 (1981), the state court decision was held not final and certiorari was dismissed. In *Detroit Police Officers Ass'n v. Young, supra*, n. 3, the record was unsettled because the Sixth Circuit reversed the district court's decision holding the racial preferences for promotion to sergeant unconstitutional, and remanded for a new trial under standards inconsistent with the opinion.

(4) studies and testimony from police professionals on the question of race as a bona-fide occupational qualification in a modern police department; and

(5) on the issue of "benign" discrimination, expert testimony and the testimony of several individual members of the Plaintiff class, including their experiences and feelings in dealing with the racial preferences.

The record is thus one on which this Court may solidly base a decision regarding the permissible parameters of municipal racial preferences in public employment.

CONCLUSION

The instant case presents important and topical issues of vital nationwide significance, in a manner ripe for resolution. It is respectfully urged that this Court agree to hear this case and resolve the questions presented herein.

Respectfully submitted,

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ALEXANDER L. STEVAS,

83-551

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, individually and on behalf of all others similarly situated; and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,
Petitioners,

vs.

CITY OF DETROIT, a Michigan Municipal Corporation; COLEMAN A. YOUNG, Mayor; WILLIAM L. HART, Chief of Police; DETROIT BOARD OF POLICE COMMISSIONERS; and GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON, ALFRED BROOKS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION

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RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 80-1837

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

v.

CITY OF DETROIT, et al.,
Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 29, 1983

Before: MERRITT and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

JONES, Circuit Judge, delivered the opinion of the Court, in which CELEBREZZE, Senior Circuit Judge, (p. 42) filed a concurring opinion. MERRITT, Circuit Judge, (pp. 43-45) filed a separate opinion concurring in part, dissenting in part.

JONES, Circuit Judge This appeal arises out of the controversy surrounding the adoption and administration of a voluntary affirmative action program for the Detroit Police Department. The plaintiffs-appellants herein are a class of white police sergeants who claim to have been adversely affected by the operation of the program as it relates to the guidelines for the promotion of officers from the rank of sergeant to that of lieutenant.[1] The appellants assert that the sergeant-to-lieutenant element of the plan violates their rights under Title VII (42 U.S.C. § 2000, *et seq.*), 42 U.S.C. § 1983, and the fourteenth Amendment to the United States Constitution.

In a series of judgments, culminating with the entry of a final order on November 17, 1980,[2] the district court thoroughly addressed each of the appellants' claims. That court concluded that (1) the adoption of an affirmative action plan was a legitimate response to the reality of prior discriminatory practices,[3] (2) the operation and proposed duration of this segment of the plan was reasonable and, thus, permissible under Title VII and the Fourteenth Amendment,[4] (3) the plan, though voluntary, should be protected from collateral attack by incorporation into a judicial decree,[5] (4) the plaintiffs were not entitled to a jury trial on disputed issues of fact concerning the validity of the plan,[6] and (5) the defendants

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[1] In *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), this Court addressed the validity of the patrolman-to-sergeant stage of this plan. The district court's determination that there had been no showing of prior intentional discrimination and that the plan, therefore, violated Title VII was reversed as clearly erroneous. The case was then remanded with guidelines for a consideration of constitutional issues similar to those which we reach here.

[2] *Baker* v. *City of Detroit*, 504 F.Supp. 841 (E.D. Mich. 1980).

[3] *Baker* v. *City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979).

[4] *Baker* v. *City of Detroit*, *supra*, 483 F.Supp. at 993 and *Baker* v. *City of Detroit*, *supra*, 504 F.Supp. at 844-46.

[5] *Baker* v. *City of Detroit*, *supra*, 504 F.Supp. at 846-48.

[6] *Baker* v. *City of Detroit*, 458 F.Supp. 379 (E.D. Mich. 1978).

were entitled to summary judgment with regard to the plaintiffs' claims for monetary judgments other than back pay.[7] The appellants contest the propriety of each of these rulings in turn.[8] Recognizing the importance and the difficulty of the issues raised by this appeal, this Court has given careful consideration to each of the appellants' contentions.

We now hold that the affirmative action plan adopted for the Detroit Police Department is a valid and permissible remedy for the clearly identifiable past discriminatory practices in that department.[9] For the reasons detailed below, we affirm all judgments rendered by the district court in this matter.

I

In 1974, the Detroit Police Department voluntarily adopted a set of affirmative action plans in an effort to eliminate discriminatory hiring practices and to increase the number of minority applicants being promoted from existing promotion lists. The three basic job levels in the department are patrol-

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[7] *Baker* v. *City of Detroit*, 483 F.Supp. 919 (E.D. Mich. 1979).

[8] The appellants have also objected to the district court's treatment of several issues addressed in its decision on the liability issues in *Baker* v. *City of Detroit*, *supra*, 483 F.Supp. 930 at 994-95, to wit: (1) the appellants claim that the court erred in finding that their rights under the Michigan Fair Employment Practices Act and Art. 1 Sec. 2 of the Michigan Constitution were not violated; (2) that the court erred in finding that the applicable collective bargaining agreement had not been violated since there had been no "refusal to bargain" within the terms of that agreement; and (3) that the court erred in finding that there had been no denial of due process since the city charter did not create a property right in public employment and that the Board had not violated the charter in any event.

We have considered each of these claims and for the reasons set forth in the district court's opinion, find that they are all without merit. Accordingly, we will not address them further in the course of our disposition of this appeal. *Accord*, *VanAken* v. *Young*, 541 F.Supp. 448, 460 (E.D. Mich. 1982).

[9] *See Detroit Police Officers Association* v. *Young*, *supra* at note 1, (addressing evidence of prior discriminatory practices on the part of the department).

man, sergeant and lieutenant. An end goal of a 50/50 staffing ratio was adopted for all levels.[10] The portion of the plan pertinent to the instant appeal is that affecting the guidelines for promotions from sergeant to lieutenant.

Prior to 1974, all candidates for promotion were ranked on a single list. Each was given a numerical rating based on various factors including, inter alia, their individual score on a written exam.[11] The promotions would then be made by beginning with the highest-ranking candidate and working down the list until all available positions were filled.

The affirmative action plan does not alter the basic criteria for determining promotion eligibility, nor does it alter the minimum requirements necessary for consideration for the rank of lieutenant.[12] The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternately from each list so that white and black officers are promoted in equal numbers. This 50/50 plan is to remain in effect until fifty percent of the lieutenant corps is black, an event estimated to occur in 1990.

The appellants are a group of white officers in the department whose promotions were allegedly delayed or denied because of the affirmative action plan. Their complaint essentially is that had all candidates been ranked on a single roster, their rankings would have been higher than some or all of those blacks promoted under the plan. It is this result

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[10] *See Id.*, 608 F.2d at 680-81, for a full description of the details of the Board's overall plan.

[11] *Id.* (other criteria included length of service, performance or service ratings set by superiors, degree of college education or credits, veterans' points, and an oral interview).

[12] Only candidates receiving a raw score of 70 or better on the written exam are qualified to be listed on the roster, no matter how they fare on other items of consideration.

which the appellants contend is the product of illegal discrimination.

The appellants do not argue in this appeal, nor could it be seriously contended given the numerous judicial determinations on the issue, that affirmative action plans are *per se* illegal.[13] *See, Fullilove* v. *Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 750 (1978); *Williams* v. *City of New Orleans*, ____ F.2d ____ (5th Cir. December 16, 1982); *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982); *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982). *See also United States* v. *City of Miami, Florida*, 614 F.2d 1322 (5th Cir. 1980) and cases cited therein. This is true whether the challenge has been raised under Title VII, *see United Steelworkers of America, AFL-CIO-CLC* v. *Weber, et al.*, 443 U.S. 193, 209, 99 S. Ct. 2721, 2729, 61 L.Ed.2d 480 (1979); *Williams* v. *City of New Orleans, supra; LaRiviere* v. *EEOC & California Highway Patrol*, 682 F.2d 1275 (9th Cir. 1982), the Fourteenth Amendment, *see Valentine* v. *Smith*, 654 F.2d 503 (9th Cir. 1981), or both, *see Boston Chapter, NAACP* v. *Beecher, supra.* In fact, this Court has previously found that, under the appropriate circumstances, affirmative action plans can withstand either challenge.[14] *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). The appellants do contend, however, that this *particular* affirmative action plan overstepped the bounds of statutory and constitutional validity.[15]

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[13] As Justice Brennan noted in his concurring opinion in *Regents of University of California* v. *Bakke*, 438 U.S. 265, 336 (1978), no decision of the Supreme Court has ever adopted the proposition that the Constitution must be colorblind. *See also Stotts* v. *Memphis Fire Department*, 679 F.2d 541, 553 (6th Cir. 1982).

[14] *See* note 1, *supra.*

[15] The appellants have challenged this plan under Title VII, the Fourteenth Amendment and 42 U.S.C. § 1983. Because we find that,

In assessing the merits of these claims, we will first analyze the guidelines under which we are to judge the propriety of any given affirmative action program. Reviewing the particular facts of the case before us in light of those principles will then enable us to determine whether, in fact, the plaintiffs' rights have been violated by the operation of this particular plan.

II

A. Title VII

In *United Steelworkers of America* v. *Weber*, *supra*, the Supreme Court made clear that Title VII does not prohibit all remedial, race-conscious affirmative action plans. 443 U.S. at 209. In *Weber*, the Supreme Court examined a voluntary affirmative action program adopted by a private employer which guaranteed fifty percent of the openings in an in-plant craft-training program for black employees. The Court considered the terms and policies of Title VII and concluded that, although private employers were not required to implement affirmative remedial programs to offset prior racial imbalances, the Act does not prohibit voluntary race-conscious actions which are consistent with the antidiscrimination policy of the statute. *See Detroit Police Officers Association* v. *Young*, 608 F.2d at 689.

The Court then proceeded to examine whether the particular affirmative action program before it fell within the bounds of what is deemed permissible under the ambit of Title VII. The Court refused to draw any bright line for defining the outer limits of a permissible affirmative action plan. It did, however, single out some particular features of the plan before it which compelled the conclusion that that program was "on

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with regard to liability in affirmative action cases, the analysis under § 1983 is identical to that under the Fourteenth Amendment, we simply omit any discussion of § 1983 until we reach a consideration of the appellants' claim for damages.

the permissible side of the line." *United Steelworkers of America* v. *Weber*, 443 U.S. at 208. The plan was aimed at breaking down prior patterns of segregation and racial heirarchy, it was deemed to not "unnecessarily trammel" the interests of the white employees and was merely a temporary measure, to end when the manifested racial imbalance no longer existed.

There is no doubt that, on its facts, *Weber* dealt with whether and to what extent a private employer could adopt an affirmative action plan and remain consistent with the mandates of Title VII. This does not mean, however, that the analysis in *Weber* is inapposite to a case in which a public employer has been charged with a violation of Title VII for the implementation of similar programs. On the contrary, Title VII was specifically amended to include public employers within its purview so that states and their official agencies are explicitly subject to Title VII mandates.[16] In the traditional context of minority complaints under Title VII, the analysis employed for determining whether a statutory violation has occurred has been applied consistently, whether the employer is a public or private entity.[17] There is no reason to alter the reach of Title VII in the present context.[18]

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[16] *See* The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(1), (5), 86 Stat. 103.

[17] *See e.g.*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Grano* v. *Dept. of Development of City of Columbus*, 637 F.2d 1073 (6th Cir. 1980); *Horace* v. *City of Pontiac*, 624 F.2d 765 (6th Cir. 1980); *Calderon* v. *Martin County*, 639 F.2d 271 (5th Cir. 1981); *Dumas* v. *Town of Mt. Vernon, Ala.*, 612 F.2d 974 (5th Cir. 1980).

[18] Under some circumstances, Title VII places all employers, whether public or private, in a difficult positon. Where prior discriminatory practices have occurred and can be shown, the employer is subject to liability to those minorities who have been the victims of that discrimination. In attempting to remedy past acts and to thereby avoid such liability, the employer runs the risk of being charged with a violation of Title VII by those nonminorities who are no longer benefiting from the employer's past discriminatory practices. We believe that it was largely this unique burden which Title VII places on an employer *qua* employer that the *Weber* court endeavored to reconcile.

Where a public employer adopts a voluntary affirmative action measure which satisfies the bounds of permissibility gleaned from *Weber*, that employer will be insulated from Title VII liability. *Williams* v. *City of New Orleans*, *supra*; *LaRiviere* v. *EEOC*, 682 F.2d at 1279; *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 965. This conclusion lay behind a significant portion of our analysis and holding in *Young* and we do not now deviate from that stance. *Cf. VanAken* v. *Young*, 541 F.Supp. 448 (E.D. Mich. 1982).

B. Fourteenth Amendment

To hold that a public employer is not liable under Title VII where its affirmative action program satisfies *Weber* does not necessarily end the inquiry where, as here, that employer has also been charged with a violation of the Fourteenth Amendment. The Supreme Court analyzed the scope and intent of Title VII in *Weber*; it in no way intimated that had the plan before it been subject to the strictures of the Fourteenth Amendment, the test of permissibility would have been the same. Instead, it is clear that the Court has chosen to keep the two analyses distinct.[19] When we cease analyzing the actions of a public employer qua employer and begin to examine the validity of those actions as state action, a constitutional inquiry is appropriate.[20] *Accord Detroit Police Officers Association*

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[19] It is significant that *Bakke* was not cited as authority for the ultimate resolution of the issues in *Weber* and that the court did not later rely on *Weber* when it again addressed the constitutional bounds of permissible affirmative action in *Fullilove*.

[20] In the lower court opinion in this case, Judge Keith recognized the distinction between a *Weber* Title VII analysis and the full analysis required where a governmental employer is also charged with a violation of the Fourteenth Amendment. He went on, however, to conclude that the standards discussed in *Weber* sufficiently delineated the bounds of reasonableness in the constitutional analysis as well.

Similarly, in *Boston Chapter, NAACP*, v. *Beecher*, 679 F.2d at 976, the First Circuit indicated a belief that *Weber* implicitly defines

v. *Young, supra; Valentine* v. *Smith, supra; United States* v. *City of Miami, Florida, supra.*

The Supreme Court has not provided the kind of guidance in the constitutional context that *Weber* affords under Title VII. Instead, the Court has issued a series of opinions in the course of two significant cases on this issue, *Regents of University of California* v. *Bakke, supra,* and *Fullilove* v. *Klutznick, supra.* The only clear consensus to be garnered from these various statements is that in any affirmative action program (1) some governmental interest must be served, and (2) the program must somehow be directed toward the achievement of that objective. Beyond this, however, there appears to be no agreement on the nature of the governmental interest which must be at stake, on the finding necessary to establish the presence of that interest, *see,Valentine* v. *Smith, supra,* 654 F.2d at 509 n.11 and accompanying text, nor on the standard under which the method employed to achieve that interest is to be reviewed. *Id.* at n.12.[21]

In *Young,* this Court found that the Brennan-White-Marshall-Blackmun opinion in *Bakke*[22] offered the most reason-

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the permissible remedies in the § 1983 context as well as that under Title VII.

Our discussion explicitly maintains flexibility in the determination of whether any affirmative action plan meets a constitutional requirement of reasonableness. In addition, our review of this particular plan has convinced us that it would be permissible even under the strictest of standards. As such, we need not, nor do we choose to, adopt the *Weber* standards as determinative in all cases requiring a Fourteenth Amendment or § 1983 analysis.

[21] After attempting to discern a standard to be applied to affirmative action plans, the Fifth Circuit noted:

> We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree.

United States v. *City of Miami,* 614 F.2d 1322 (5th Cir. 1980). We do not believe that the court's subsequent decision in *Fullilove* has significantly clarified the Supreme Court's stance on this issue.

[22] Justice Powell wrote the Court's opinion in *Bakke* where he found that though affirmative action plans may not be *per se* illegal,

able guidance for a resolution of these constitutional issues.[23] Though *Young* was decided in the interim between *Bakke* and *Fullilove*, it does not appear that *Fullilove* requires a retreat from our earlier position. *Fullilove* is a plurality decision with little precedential value.[24] It also addressed the constitutionality of affirmative action in a materially distinguishable context.[25] In addition, the concurring opinion authored by Justice Marshall in *Fullilove* clearly reaffirms the analysis generally relied upon in the initial formulation of this Circuit's approach to affirmative action. Absent an opinion joined by a majority of the Supreme Court, or an *en banc* decision of this Court, we are unpersuaded that the standard in *Young* is no longer the law of this Circuit.[26]

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the Board of Regents was not a competent body to make the determination that prior discrimination in society as a whole justified the use of affirmative action within the operations of the University. Justice Brennan concurring in part and dissenting in part, in an opinion joined by Justices White, Marshall and Blackmun, would have found the University's plan valid in all respects. The other four Justices never reached the constitutional issue, concurring in Justice Powell's conclusion that the Board of Regents was not a competent body to conclude that such a plan was appropriate.

[23] *Accord Valentine* v. *Smith*, 654 F.2d 503 (8th Cir. 1980); *United States* v. *City of Miami, Fla.*, *supra* at note 19.

[24] *See Trans World Airlines* v. *Hardison*, 432 U.S. 63, 73 n.8 (1977) *citing Neil* v. *Biggers*, 409 U.S. 188, 192 (1972) (judgment entered by an equally divided court is not entitled to precedential weight); *Berlin* v. *F. C. Publications*, 329 F.2d 541 (2d Cir. 1964) (affirmance by an equally divided court is, between the parties, conclusive determination, but the principles of law involved, having not gained the assent of a majority of the court, prevents the case from being authority for other cases); *But see Marks* v. *United States*, 430 U.S. 188 (1976) (holding of fragmented court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds).

[25] In *Fullilove*, the Court was faced with determining whether a congressional decision to implement a ten percent set-aside in favor of minority contractors for public works contracts was constitutional. That this issue is distinct from the employment context is manifested by the decision of the court, authored by Chief Justice Burger and joined by Justice White. The Court refused to place the *Fullilove* situation into any one of the *Bakke* standards, finding simply that Congress had the particular power under Section 5 of the Fourteenth Amendment to institute such a plan.

[26] Given the existence of an established precedent in this Circuit,

The standard to be applied in this case, then, is clearly set out in the pages of Judge Lively's opinion in *Young*.[27] At the outset, we note that the standard is one which does apply "strict scrutiny". The review under the Fourteenth Amendment should be "strict--not 'strict in theory and fatal in fact,' because it is stigma that causes fatality--but strict and searching nonetheless." *Regents of University of California* v. *Bakke*, 438 U.S. at 361-62. However, as noted in *Young*, in cases involving discrimination against those not traditionally discriminated against, "strict scrutiny" takes on a more precise meaning:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and rational policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain . . . .

608 F.2d at 697.[28] Bearing this general standard in mind,

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we find it ill advised to attempt to dissect the positions taken in this and similar contexts by the various Justices on the Court and to then predict exactly which form of constitutional analysis may win the approval of a majority. The dissent's formulation of a version of the constitutional standard, purportedly based on an overall interpretation of the Supreme Court's various nondefinitive statements on the issue, is unnecessary and inappropriate in light of *Young*.

[27] *See* concurring opinion of Judge Celebrezze herein, infra at 42.

[28] In *Valentine* v. *Smith*, *supra* at note 21, the Eighth Circuit simply defined the appropriate degree of scrutiny as a "searching analysis." 654 F.2d at 509. Whatever the appropriate semantics, we recognize that though we are dealing with a unique form of constitutional analysis commanding somewhat unique considerations, it is a constitutional issue nonetheless and must be given extensive and careful consideration.

the first stage in our approach to affirmative action programs entails an analysis of the need for such remedial measures—i.e., with the presence of a governmental interest in their implementation. It is uncontested that the government has a significant interest in ameliorating the disabling effects of identified discrimination. *Fullilove* v. *Klutznick*, 448 U.S. at 497 (opinion of Justice Powell, concurring). "The existence of illegal discrimination justifies the imposition of a remedy that will make persons whole for injuries suffered on account of unlawful . . . discrimination. *Albermarle Paper Co.* v. *Moody* 422 U.S. 405, 418 (1975)." *Id.*

A direct showing of past intentional discrimination is not required to establish the existence of this interest, however. It is sufficient if findings are made by a body with the competence to act in this area[29] and a review of those findings reveals "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities." *Detroit Police Officers Association* v. *Young*, 608 F.2d at 694 (*quoting Bakke*, 438 U.S. at 362).

Once the governmental interest in some remedial action is thus established,[30] we must proceed to determine whether

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[29] We recognize that this element was not a part of the guidelines for affirmative action laid out in Justice Brennan's opinion in *Bakke*. Rather, this requirement arises out of Justice Powell's opinion in that case. Though Judge Lively's opinion does specifically choose to follow the Brennan-White-Marshall-Blackmun aproach, it also appears to require some finding by an appropriate body, one competent in the area. As such, we have similarly addressed the issue of appropriate findings while adopting Justice Brennan's guidelines for purposes of all subsequent analysis.

[30] We note that in *Young*, Judge Lively specifically observed that the city's assertion that the affirmative action program was necessary to satisfy its operational need for improved law enforcement was a substantial justification for the adoption of such a plan. Accordingly, the case was remanded for a determination of whether the governmental interest in the plan could be justified on either the basis of the need for redress or on the basis of the department's operational needs. Given our resolution of the redress issue and our consideration of the department's discrimination against the general population of the City of Detroit within the context of the need for

the remedial measures employed are reasonable. This includes an examination of whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably[31] used in light of the program's objectives. *Regents of the University of California* v. *Bakke*, 438 U.S. at 372-76; *Fullilove* v. *Klutznick*, 448 U.S. at 518-19 If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment. *Detroit Police Officers Association* v. *Young*, 608 F.2d at 694. *Accord United States* v. *City of Miami, Florida*, 614 F.2d at 1338.

Before proceeding to analyze the facts before us in light of the standards detailed above, we note that, although we have drawn the distinction between a Title VII analysis and that to be employed when reviewing in light of the Fourteenth Amendment, and have indicated our present unwillingness to employ only the *Weber* standards in the constitutional context, we are still able to combine the two analyses for purposes of a resolution of this case. We find that to the extent that the constitutional standard may be more exacting than that employed in *Weber*, the Title VII challenge to the Detroit Police plan is necessarily subsumed into that made here under the Fourteenth Amendment; what is valid under the latter will certainly pass muster under Title VII.[32]

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redress, we find it unnecessary to address the validity of the operational needs defense to affirmative action in this context. *See also Boston Chapter, NAACP* v. *Beecher*, *supra* at note 19, and *VanAken* v. *Young*, *supra* at note 8, for further discussions regarding the validity of an operational needs argument.

[31] What is or is not a "reasonable" use of race will vary with the circumstances surrounding the need for, urgency and operation of a given plan. The factors to be weighed in making this determination are addressed more fully below in our discussion of the validity of the Detroit plan.

[32] At this stage, we note that were we to find that some other, stricter, standard were required or appropriate, for whatever reason, that we would still find this plan constitutionally valid. As in *Fullilove*, this program is acceptable under any of the "formulas of analysis articulated in such cases as *University of California Board of Regents* v. *Bakke*, 438 U.S. 265 (1978)." 448 U.S. at 492.

III

Though the appellants acknowledge that the guidelines we detail here are controlling, they attack this particular plan's ability to fit within them. They claim that the 50/50 promotion program was adopted in 1974 despite the fact that there was no basis for concluding that minority underrepresentation at the lieutenant level was substantial or, more importantly, that minority access to that rank was in any way impeded by the effects of prior discrimination. In fact, it is alleged that, post-1973, the written examinations and other promotional criteria actually favored minority candidates. Essentially, the appellants claim that the need for redress at this level and time was simply nonexistent. Absent a redress justification, and in the face of what the appellants deem to be a specious operational needs argument, they contend that there is simply no significant governmental interest to be served by the imposition of any sergeant-to-lieutenant affirmative action plan.

Additionally, the appellants argue that, assuming arguendo that some affirmative action was required, the promotion quota was not sufficiently tailored to the achievement of the objective of the remedy to fall within the permissible bounds of either Title VII or the Fourteenth Amendment.

A. Governmental Interest in Affirmative Action

In *Young*, this Court held that the Board of Police Commissioners in Detroit was competent to make findings regarding the existence and effect of prior discrimination on the part of the Police Department. We reaffirm that decision, noting that that body's competence encompasses findings which relate to hiring practices, interdepartmental promotions and the department's overall operations as they affect the populace of Detroit.[33]

[33] The Board of Police Commissioners in Detroit has extremely

After conducting formal administrative hearings, the Board of Police Commissioners found extensive past racial discrimination in all three of the areas detailed above. Those administrative findings are supported both by our earlier findings in *Young*, 608 F.2d at 686-94, and the *de novo* findings of the district court in the case at bar. *Baker* v. *City of Detroit*, 483 F.Supp. 930, 940-958 (E.D. Mich. 1979).

In *Young*, we discussed the nature of the evidence necessary to justify a finding of prior overt discrimination. 608 F.2d at 693. Where consistent practices have resulted in a significant disparate impact among races, the discriminatory intent may be established by any evidence which logically supports the inference that state action or policies were adopted for invidious purposes. *Id.* Such "logical" evidence includes the statistics of racial impact,[34] the historical background of the decisions which led to such an impact, the contemporaneous statements of the members of the decision-making body, and the presence of actions from which a disparate impact is

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broad authority over the operation of the Detroit police department. Under the Charter of the City of Detroit adopted in 1974, the Board of Police Commissioners is appointed by the Mayor with the consent of the City Council. The Board has the power to: (1) establish policies, rules and regulations in consultation with the chief of police; (2) review and approve the departmental budget; (3) receive and resolve complaints about the operation of the police department; (4) act as final reviewing authority over employee discipline; and (5) subpoena witnesses, administer oaths, take testimony and require the production of evidence. The Board reports annually to the Mayor, the City Council and the public regarding the department's activities during the prior year and its future plans.

The Board of Regents may have had similar authority with regard to the operation of the University of California. But there is nevertheless a distinguishing characteristic. The university's affirmative action program was aimed at redressing past societal discrimination, not discrimination by the university. It was simply assessing the performance of society generally, not its own performance. Justice Powell held that the regents' educational authority did not qualify them to make findings about discrimination in society generally. His theory was that the Board of Regents had no greater knowledge of societal discrimination and no greater interest, incentive or need to make accurate and objective findings on discrimination in general than any other group, agency or individual. The record, such as

foreseeable. *Id.; cf. Columbus Board of Education* v. *Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed. 666 (1979).

The record is replete with evidence to support the district court's conclusion that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent, overt policy of intentional discrimination against blacks in all phases of its operations. Judge Keith conducted a lengthy trial in this case and made comprehensive written findings of past discrimination dating as far back as the city's first race riot in 1943. Most of this historical data stands undisputed.

In 1950 when the Detroit population was 16 percent black, less than 2.5 percent of the police force was black (96 black and 3,565 white officers) and less than one percent of the sergeants and lieutenants were black (3 black sergeants out of 347 and one black lieutenant of 168 total). At the time of the severe race riot in 1967, the city was forty percent black with a police force that was from four to six percent black, only a minor fraction of which were members of the command structure. By 1974 when the challenged affirmative action plan was initiated, the black population had again increased significantly, yet the department remained 17.2 percent black overall and less than five percent of the lieutenants were black (11 black and 219 white lieutenants).[38]

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there was in *Bakke*, did not contain an acknowledgement of the existence of discrimination in medical admissions policies, past or present. The record here is replete with acknowledgements and findings of discrimination by and within the police department itself.

[34] *See e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 337 n.17, 339-40 n.20, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)

[38] Updated statistics (submitted by order of the court) on the racial composition of the various ranks of the department still show a marked disparity between relative representation of blacks and

There is no doubt that the inference of intentional discrimination which arises from the severe statistical disparity is an accurate one. The district court has itemized in detail the evidence of intentional discrimination. For example, prior to the 1960's, squad cars and patrol beats were clearly segregated. Blacks and whites were not assigned to ride together, nor were blacks ever assigned to patrol white areas. When initial tentative efforts were made to integrate some squad cars, the white officers struck and the prior policy was reinstituted in full force. Numerous instances of discriminatory practices in hiring, promotion, the ability to transfer from a patrol position to a plain clothes one and the day-to-day treatment of black officers, evidences the systematic exclusion of blacks from any meaningful role on the Detroit police force. No sufficient explanation for the severe underrepresentation of blacks at all levels, other than this manifest systematic exclusion, has been proffered. *See Detroit Police Officers Association* v. *Young*, 608 F.2d at 687.

The history of this discrimination is corroborated by numerous independent studies made in response to the perceived problems within, and caused by the Detroit police force. These include, *inter alia*, reports of the Michigan Civil Rights

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whites and between the percentage of blacks in the city and the police ranks.

Detroit Police Department — Racial Breakdown

	Lieutenant		Sergeant		Police Officer		Total	
	White	Black	White	Black	White	Black	White	Black
1975	199 (89%)	23 (11%)	1026 (91%)	101 (9%)	2947 (73%)	1073 (27%)	4215 (78%)	1208 (22%)
1976	161 (90%)	18 (10%)	977 (86%)	154 (14%)	2677 (73%)	978 (27%)	3858 (77%)	1165 (23%)
1977	176 (78%)	51 (22%)	871 (85%)	148 (15%)	2775 (63%)	1685 (38%)	3866 (67%)	1905 (33%)
1978	157 (77%)	47 (23%)	799 (85%)	146 (15%)	2673 (61%)	1719 (39%)	3670 (65%)	1936 (35%)
1979	143 (77%)	44 (23%)	725 (83%)	144 (17%)	2467 (64%)	1394 (36%)	3374 (68%)	1604 (32%
1980	131 (73%)	56 (27%)	716 (80%)	175 (20%)	2166 (73%)	805 (27%)	3070 (74%)	1061 (26%
1981	145 (73%)	54 (27%)	660 (79%)	173 (21%)	2074 (71%)	860 (29%)	2993 (72%)	1111 (28%

Commission, the 1968 report of the National Advisory Commission on Civil Disorders, and the 1967 report of the President's Crime Commission. These and others are analyzed in full in the district court's historical analysis.

The record justifies the district court's finding that while the police department was discriminating against blacks in employment, a white police department was discriminating against black citizens on the street. Two massive uprisings, one in 1943 and another in 1967, resulted directly from discriminatory treatment of black citizens by white police officers. Justice Thurgood Marshall in his report on the 1943 Detroit uprising, written while a nationally known civil rights lawyer (quoted by the district court, 483 F.Supp. 940-41), indicates that the "anti-Negro attitude of many members of the force helped to make the riot inevitable." This and Justice Marshall's other findings are manifest in the mass of evidence adduced at the trial of this case. In the 1967 uprising, large sections of the city were burned and many deaths, injuries and arrests were reported—all affecting blacks and black areas in a significantly disproportionate manner. The record before this Court also supports the conclusion of John Hershey in his study entitled, *The Algiers Motel Incident*, p. 36 (1968) that a material cause of the 1967 riot was "unequal justice," "the experience of the black populous . . . with the cop in the street." We find that Judge Keith's findings and conclusions in reviewing the findings of the Police Board regarding past discrimination are correct in all material respects.

In the face of this evidence, the appellants continue to maintain that affirmative action, though necessary at some level in the police force, was unjustifiable in the sergeant-to-lieutenant promotion stage. The argument centers on the fact that after 1968, and up until the time of this litigation, the department did embark upon a concentrated program of affirmative action. They contend that the recruiting efforts in the early 1970s, the impact of the imposition of a 1976 in-

crease in the post-1974 hiring quota and the effect of the promotion quota for sergeants have eliminated any underrepresentation of minorities which can be classified as "substantial and chronic." The second element of this argument is based on appellants' claim that the rise in potential black candidates for lieutenant (due to the increases in the lower levels) and the changes in the promotion guidelines have virtually given blacks equal, merit-based access to the lieutenant ranks.

These arguments misconstrue the nature of this element of our inquiry. The district judge was faced with a determination of whether the Board's decision to adopt a voluntary affirmative action plan in 1974 was constitutionally permissible. There is no doubt that as of 1974 there was severe underrepresentation of blacks in the lieutenant corps, and that the post-1971 recruiting policies had not worked any significant change in that reality. We also have no doubt that that underrepresentation was caused not solely by lower-level discriminatory practices, but by discrimination in the specific promotion process designed for lieutenants as well. We will not reiterate the thorough analysis of the promotional model which the district court undertook. *See Baker* v. *City of Detroit*, 438 F.Supp. at 965-979. We simply note that we are satisfied that the district court's finding that blacks had been illegally denied access to these promotions by the working of the promotion system itself is correct.[36]

[36] There is extensive support in the record for these findings. For years, the department employed IQ and aptitude tests which have long been recognized as having an impermissible adverse impact on minorities. In fact, the tests used by the department early on were specifically prohibited by the Uniform Guidelines on Employee Selection Procedures adopted by the EEOC, 29 C.F.R. § 1607.14c(1) for any selection which is to be job related. Testimony adduced at trial indicated that some of those administering the tests had "no doubt" that the promotional exams had, at times, been discriminatory. In addition, certain black officers also expressed a conviction that their subjectively set service ratings reflected the discriminatory bent of their supervisors. Finally, the statistical data itself raises an inference in support of the district court's conclusions in this regard.

We find, therefore, that the contention that the need for redress was nonexistent at the stage at which the appellants were adversely affected by it is without merit.

B. Reasonableness of the Program

We must now proceed to the second step of our constitutional analysis: whether the remedy adopted in response to the perceived governmental interest was sufficiently reasonable in light of those objectives. As noted previously, this entails a determination of whether the white police officers were unduly stigmatized by the program and whether the particular program applies the use of racial classifications reasonably.

1. Attachment of a Stigma

Whether an undue stigma results from an affirmative action plan is a difficult issue. Even once the need for some redress is established in a given case, the Supreme Court has cautioned that due care must be taken to insure that those who claim to be disadvantaged by a plan, its beneficiaries, or both, are not unduly stigmatized by an improperly drawn or implemented affirmative action program. While this is true, however, remedial race-conscious programs under affirmative action plans must not be held hostage by those who claim to be adversely impacted unless they can demonstrate a *constitutionally impermissible* stigma. Unless this is required, the legacy of racial discrimination would never be remedied. Racial classifications which favor minorities do not *per se* result in such a stigma. As Justice Blackmun observed in his *Bakke* opinion, "[i]n order to get beyond racism we must first take race into account . . . and in order to treat some persons equally we must first treat them differently. We cannot—we dare not – let the Equal Protection Clause perpetuate racial supremacy." 438 U.S. at 407. In the context we address today, differential treatment is neither constitutionally offensive

nor unduly stigmatizing and we refuse to invalidate the Board program on that basis.

First, though undue stigma must be cautiously guarded against, a plan designed to remedy the effects of past discrimination is not invalid merely because some individuals not in any way culpable with respect to past discriminatory acts must bear the brunt of the racial preference. *Valentine* v. *Smith*, 654 F.2d at 511. "When effectuating a limited and properly-tailored remedy to cure the effects of prior discrimination, such a 'sharing the burden' by innocent parties is not impermissible." *Fullilove* v. *Klutznick*, 448 U.S. at 484 (opinion of Chief Justice Burger).

This case is "not a simple mirror image of a case involving claims of discrimination against minorities." *Detroit Police Officers Association* v. *Young*, 608 F.2d at 697.[37] We are dealing with a white majority which has traditionally benefited from the prior systematic discriminatory practices which have given rise to the need for the kind of affirmative action program the Detroit Police Board implemented. The self-esteem of whites as a group is not generally endangered by attempting to remedy past acts militating in their favor, the situation only arises in the first instance because of their social dominance.[38] The purpose of this program is to aid blacks, it is not aimed at excluding whites—the fact that whites have equal access to the lieutenant ranks and that the plan is only temporary clearly support this conclusion. In such instances, the white majority is simply not being subjected to what amounts to a constitutionally invidious stigma.

Second, we believe that where those hired or promoted by operation of affirmative action are qualified for the position in which they are placed, no constitutionally impermissible

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[37] See text, *supra* at page 7.

[38] *See Nagel, Thomas,* "Equal Treatment and Compensatory Discrimination," *Equality and Preferential Treatment*, Eds. Cohen, Nagel, Scanlon (1977) pp. 3-18.

stigma attaches. *Valentine* v. *Smith*, *supra*. In *Smith*, the Eighth Circuit considered a complaint instituted by a white applicant for a teaching position at Arkansas State University. The record specifically established that despite receiving the highest of the many recommendations from the screening committee, Ms. Valentine was not hired by the University. The decision was made to hire a black educator in her stead. There is no doubt that that decision was "substantially motivated by a race-conscious choice by ASU to implement its affirmative action plan." 654 F.2d at 507. The court concluded that as long as the black candidate was qualified to fill the position, as the facts in the record established she was, there would be no stigma to any of the parties involved. The court noted that the majority group is rarely, if ever, stigmatized. This was deemed to be particularly true where the party or parties otherwise filling the position were qualified, thus guaranteeing that no negative inference could arise regarding the quality of the credentials of those passed over. Similarly, where the beneficiary of the plan is qualified, there can be no stigma caused by a perception that they would somehow be undeserving. Based on this reasoning, the court concluded:

> Where the applicant is qualified, the risk of stigma is considerably less because presumably the person can perform the task adequately. The evidence in this case shows not only that Georgia Mitchell [the black applicant] was fully qualified for the job but also she performed very well as a teacher. We cannot invalidate ASU's affirmative action plan, or its application to the facts here, on the supposition that someone might be stigmatized.

Id. at 511.

We find this reasoning apposite to the situation before us. At trial, the plaintiffs argued that they and the department were harmed by the new promotion guidelines. They contended that they had been passed over by candidates who

were manifestly less qualified for the rank of lieutenant. The clear implication of their arguments is that, after 1974, the quality of the officers at this level was somehow less than it could or should have been. The district court dedicated a large portion of its opinion to the merits of this argument. Judge Keith determined that the black officers who were promoted out of sequence were as substantially equally qualified as the white officers promoted in strict rank order. There is extensive support in the record for this conclusion.[39] At minimum, we are convinced by the record evidence that, from 1974 to date, *only well-qualified* blacks were promoted to the lieutenant corps.[40] In such instances we find that no stigma of a constitutional magnitude attaches to either those claiming to be adversely impacted by the plan or its beneficiaries.

We recognize that there has been, and continues to be, a misperception regarding the operation of affirmative action. We have no doubt that, at times, some persons may have been placed in positions for which they were unqualified in an effort to discredit affirmative action. Whether these hirings or promotions have occurred *in fact*, they have never been and would not now be justifiable under the *law* as it relates to affirmative action. If a party is not qualified for a position in the first instance, affirmative action considerations do not come into play.

2. Propriety of the 50/50 Racial Classification

The use of the 50/50 promotional preference is to be judged against a "test of reasonableness." *Detroit Police Officers Association* v. *Young*, 608 F.2d at 694. *See also Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 977; *U.S.* v. *City of Miami*,

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[39] *Baker* v. *City of Detroit*, 483 F.Supp. at 970-79.

[40] *Id.* at 979.

Florida, 614 F.2d at 1338. This test encompasses a variety of considerations which may vary given the nature of the preference plan to be considered and the circumstances surrounding its implementation. Like the Supreme Court, we do not now attempt to define what will guarantee a finding of reasonableness for all purposes. Rather, we address those factors which lead us to conclude that this plan is reasonable in light of what the record reveals about the Detroit Police Department. We find that (1) the affirmative action plan is "substantially related" to the objective of remediation of prior discrimination, *Detroit Police Officers Association* v. *Young*, 608 F.2d 696, (2) the use of racial classifications reflects the only legitimate method for achieving those objectives in light of the urgent need for a remedy and the practical limitations placed on the effective use of other means, *id.*, (3) the plan is temporary in nature, scheduled to endure only so long as is necessary to achieve its legitimate goals, *Valentine* v. *Smith*, 654 F.2d at 510, and (4) the plan does not otherwise "unnecessarily trammel" the interests of white candidates for promotion. *Detroit Police Officers Association* v. *Young*, 608 F.2d 696. Though no one of these characteristics is determinative, taken as a whole they justify a conclusion that this particular plan is within the bounds of what is constitutionally reasonable.

The Board of Police Commissioners in 1974, the district court in the present case and this Court in *Young*, found three identifiable forms of injury to the black citizens of Detroit arising from past employment discrimination in the police department. First, in 1974 there were not as many black officers in various positions in the department as there would have been in the absence of discrimination. Second, during the major period of discrimination—roughly a twenty-year period from the end of World War II to the mid-1960s—there were fewer black officers than there otherwise would have been. Third, as a consequence of employment discrimination, black citizens

suffered harrassment and indignities at the hands of a white police force.

In 1974, the chief legislative body of Detroit adopted for the first time the requirement that city employees, including police officers, live within the city limits. The Board of Police Commissioners estimated that in 1974-75 the population of the city was approximately fifty percent black.[41] It did not find in 1974 that the lieutenant corps would be exactly fifty percent black in the absence of discrimination. Rather, it found that in the absence of discrimination, the proportion of black lieutenants would be considerably higher than it was and in time would be approaching the fifty percent mark. The Board concluded that a 50/50 hiring and promotion ratio would provide a reasonable and even-handed remedy in view of all of the injuries suffered by the black citizens of Detroit, the fact that at the time (1973-74) only five percent of the lieutenants were black, and the fact that the black population of Detroit was likely to increase as a percentage of the whole.

The Board did not employ an economic or a statistical expert in 1974-75 to determine the relevant labor markets during the period of discrimination. It did not try to determine the precise number of lieutenants who would have been hired in the absence of discrimination. It simply concluded that *most police officers in the past had come from within the city and that the city was now approximately fifty percent black.*

In order to rebut the Board's findings and show reverse discrimination, the plaintiffs contended at trial that there was no need for redress because there was no discrimination in employment in the police department. In order to establish this position, the plaintiffs also contended that the relevant labor market figures were the figures for the Detroit metro-

[41] Although it is impossible to determine the exact racial characteristics of Detroit's population in 1974-75, the 1980 census shows that Detroit's black population was 63 percent. The figure for 1970

politan area, figures which would justify a much lower percentage of blacks in the police department than the figures for the City of Detroit. In light of the city's evidence concerning discrimination, the statistical evidence concerning percentages in the city population and the source of the department's labor pool, and our 1979 opinion in *Young*, the plaintiffs shifted grounds on appeal. The appellants no longer contend that there had been no prior discrimination, nor that the metropolitan area statistics are controlling. Instead, they contend that as of 1974 there was no need for redress at the lieutenant level and that, even if there were, the fifty percent ratio was, in reality, designed to do more than redress an identifiable wrong, that it was impermissibly aimed at achieving a racial balance.

The first argument has been dealt with in detail above. The second rests on the appellants' contention that the 50/50 promotion policy exceeds that necessary to offset any identifiable prior discrimination. They claim that a 50/50 ratio and a fifty percent end goal is not justifiable since their data reveals that there is no merit to the argument that the lieutenant ranks would have been fifty percent black by 1974 absent past discriminatory practices.[42] The data to which the

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was approximately 43 percent. Thus the Board's estimate of Detroit's black population in 1974 was not unreasonable.

[42] Plaintiffs argument in this respect is as follows:

> That the 50/50 quota far exceeds its purported remedial nature is also confirmed by comparing the fifty percent goal of the quota to the relevant labor market data . . . . In 1973, Mr. Fechter determined that the relevant labor market was 38.4 percent black. This represents a twelve point difference from the fifty percent quota imposed by the City the following year in 1974.
>
> Moreover, the 38.4 percent non-white labor pool for 1973 is not the relevant labor pool for the rank of lieutenant. The record shows that virtually every person promoted to the rank of lieutenant had a *minimum* of six years with the Department. Therefore, one must go back at least six years in time in order to determine the relevant labor market for lieutenants. Ac-

appellants refer is that of their own statistical expert, Mr. Alan Fechter.

Taking into account the particular qualifications necessary for entry into the police department, Mr. Fechter calculated the relevant labor market for new hires between 1945 and 1973. The following table summarizes his testimony concerning the black-white share of that market as compared to the black-white population in the department:

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cordingly, as of 1974 even the most liberal estimate of the relevant labor market for lieutenants would be the 1968 non-white labor pool of thirty percent. [App. 1760]. In other words, given the minimum period of time it takes for one to progress from the entry level to the rank of lieutenant, it is totally inaccurate to look at the relevant labor market figure for blacks at the entry level . . . .

The City has consistently ignored these distinctions and continues to insist that the lieutenants ranks would be fifty percent black absent past discrimination. When the District Court remanded this case to the Board of Police Commissioners with directions to formulate a termination date, the Chief of Police again recommended that the quota be continued until the lieutenants ranks were fifty percent black. Notwithstanding the record evidence to the contrary, the Chief informed the Board of Police Commissioners that the fifty percent end-goal was appropriate because the relevant labor market was approximately fifty percent black in 1974 . . . .

Mr. Fechter's method of linear interpolation . . . shows that the non-white labor pool would not be fifty percent black until at least 1980. But again, this is the relevant labor pool for entry level—not for lieutenants. Adding the *minimum* of six years it takes to become a lieutenant, the relevant non-white labor pool for lieutenants would not reach fifty percent until 1986.

It is therefore clear that there is no merit whatsoever to the argument that the lieutenants ranks would have been fifty percent black in 1974 absent past discrimination. As has been demonstrated, equity was achieved at the lieutenants ranks in April of 1976. The 50/50 quota is therefore excessive and unreasonable.

Plaintiffs' Reply Brief filed March 12, 1982, pp. 8-10.

Comparison, Racial Composition of Hires and Labor Pool, 1945-1978

Year	Labor Pool (Percent Nonwhite)	Labor Pool (Total Hires)	Black Hires (Estimated / Actual)		Difference
1945	13.8	301	42	5	37*
1946	14.4	304	44	7	37*
1947	15.1	577	87	17	70*
1948	15.7	288	45	9	36*
1949	16.3	414	67	7	60*
1950	17.0	313	53	3	50*
1951	17.7	258	47	28	19*
1952	18.3	328	60	27	33*
1953	18.9	189	36	10	26*
1954	19.6	369	72	7	65*
1955	20.2	327	66	11	55*
1956	20.9	187	39	11	28*
1957	21.5	158	34	9	25*
1958	22.2	14	3	3	0
1959	22.8	116	26	7	19*
1960	23.5	90	21	3	18*
1961	25.1	192	48	7	41*
1962	25.7	278	74	10	64*
1963	28.8	179	51	9	36*
1964	29.9	141	42	6	36*
1965	31.5	171	54	16	36*
1966	33.1	205	68	38	30*
1967	34.8	323	112	71	51*
1968	46.1	519	239	180	59*
1969	42.9	561	241	127	114*
1970	39.5	495	196	101	85*
1971	40.5	656	266	170	96*
1972	47.9	618	257	185	72*
1973	43.0	491	211	149	62*

*Statistically significant from zero at .05 level of probability.

Based upon that data, the appellants argue that in a race-free hiring environment the proportion of black lieutenants would have been significantly less than fifty percent in 1973 and 1974. They argue that in an increasingly black labor pool for new hires, it takes time for the percentage of blacks in the police department to equal the current percentages of blacks in the labor market. In addition, they contend that Mr. Fechter's larbor pool for promotion to lieutenant would be considerably less than that for new hires because there is a further delay of several years before a recently-hired officer becomes eligible for promotion to lieutenant. Thus, the appellants argue that this data and these additional factors for consideration establish the error in basing this affirmative action goal on the statistical data for the city's overall population.

On appeal, the appellants now agree that the lieutenant corps should have been more than five percent black as actually was the case in 1973-74 but, after reassessing their case, the appellants now argue that in the absence of past discrimination the 1973 ratio of black lieutenants would have been, *at most*, about thirty percent. They assert, therefore, that the 50/50 ratio is improper and that if such a ratio were nevertheless employed it should be discontinued at the point when redress has beeen completed, i.e., at no point later than when the thirty percent figure has been attained.[43] Since a thirty percent figure was reached by the time of trial in 1978-79, the appellants argue that the program should be terminated now. Their complaint, then, centers on the validity of the

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[43] In the course of oral argument, Judge Celebrezze asked the plaintiffs whether they were contending that a thirty percent end goal was reasonable. Despite the data disclosing this thirty percent figure, the plaintiffs refused to admit that they considered even that degree of affirmative action to be "reasonable". In light of the first branch of their argument, i.e., that no redress was necessary at this level, such a stance appears to have been judicious at that stage. However, given our disposition of the appellants' argument regarding the need for redress, we will proceed to consider their reasonableness arguments in light of the data they have supplied on this point.

top twenty percent of the affirmative action program, *both* in the interim application and in the determination of its stopping point. We find their arguments unpersuasive.

First, assuming that we were to accept the appellants' claim that the justifiable end goal should fall somewhere short of the fifty percent figure, that would not invalidate the implementation of a 50/50 ratio as the promotional guideline in 1974. Even the use of a guideline which exceeds the percentage of minorities in the population would be justifiable as a temporary measure for attaining an appropriate end goal. *See e.g., NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974) (approving 50/50 black-white hiring ratio until 25 percent of state troopers were black). The 1974 affirmative action program could not and did not immediately rectify the effects of prior discrimination in the department. During the lag time after the adoption of the affirmative action plan in 1974, the police force began to more closely approximate the desired nondiscriminatory racial composition but always fell short of that goal. The alternative – the en mass replacement in 1974 of existing white lieutenants with new black lieutenants – would have avoided the continuing discrimination but would obviously have unduly harmed the white lieutenants. The redress of the *continuing* discriminatory effect of past hiring and promotion practices justifies the use of at least a 50/50 ratio.

Second, while purporting to represent the percentage of black lieutenants that would have existed in a discrimination-free environment, plaintiffs' thirty percent end figure fails to reflect the full extent of the police department's pre-1974 discriminatory practices. The figure refers only to the number of black lientenants who, according to the plaintiffs, should be promoted in order to bring the force up to the appropriate figure. This proposed benchmark thus fails to account for those blacks who – absent discrimination – would have become lieutenants *and* would have left the force or retired by 1973. While we cannot presume to establish the precise size

of this group, we are convinced of its existence. In addition to the intangible stigmatizing effects of invidious treatment, the members of this group were deprived of the higher salaries and retirement benefits commensurate with lieutenancy. The Fourteenth Amendment does not forbid consideration and redress of this injury by affirmative action. In light of the fact that the department and the lieutenant corps were far below the nondiscriminatory level of black police officers for the 25-year period from 1945 to 1970, we do not believe that marginally increasing the percentage of black lieutenants above the figure that would exist had hiring been nondiscriminatory is an unreasonable remedy for redressing this wrong.

Third, discrimination in hiring in the Detroit police department has not injured only that finite number of black citizens who were denied the opportunity to become police officers or to be promoted to the rank of lieutenant. The district court found that the black population of the city was subject to discrimination by a predominantly white police force. The record establishes a pattern of mistreatment in the form of outright discrimination by white officers against black citizens as well as more subtle discrimination in the handling of complaints and investigations. A number of witnesses testified to the fact that many such incidents could have been avoided had black lieutenants been overseeing the interaction of police officers with black citizens. There is a clear pattern of unconstitutional deprivation of the rights of a specific, identifiable segment of the Detroit population by white members of the segregated police department. This injury was itself a direct result of the interdepartmental discrimination which is so fully documented. The 1974 affirmative action plan was dedicated to redressing *all* deleterious effects of the department's prior practices. The redress of this injury to the black population as a whole justifies a plan which goes beyond the thirty percent work force limitation which appellants imply may have been appropriate.[44]

[44] We recognize that others who have addressed these precise issues

Finally, the broad-based attack on the use of city-wide population figures is simply unsupportable. The Supreme Court has approved the use of racial composition comparisons between employers' work forces and the general area-wide population as probative of discrimination in employment discrimination cases, *see e.g., Hazelwood School District* v. *United States*, 443 U.S. 299, 308 (1977); *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 337-43 (1977), and this Court has specifically held that in the context of challenges to affirmative action, "a goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable." *Detroit Police Officers Association* v. *Young*, 608 F.2d at 696. In addition to the presumption of reasonableness which would ordinarily be accorded the use of such data, the district court specifically considered the prerequisites

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have done so in the context of a discussion of operational needs. The First Circuit recognized the unique problem which arises when those specifically designated to work with and protect the public wholly fail to reflect the racial composition of that population. That court's consideration of the problem was couched in terms of operational needs:

> An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent . . . . As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F.Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most.

We have chosen to deal with the situation with regard to the Detroit citizenry as an element of our redress analysis. This is so because in Detroit the issue cannot be neatly categorized within the bounds of "operational needs." We are faced with far more than a generalized need for a police force which reflects the racial composition of the city. We are faced, rather, with a population that has been subjected to constitutional indignities as a direct result of the discriminatory practices which have created and maintained a white-dominated police force. Whatever the appropriate semantics in such a situation, we are convinced that the facts present a constitutionally valid justification (a substantial governmental interest) for the implementation of this particular affirmative action remedy.

for employment in the police force and the impact, if any, those considerations should have in an appropriate calculation of the relevant labor market. Judge Keith accepted the use of the city-wide figures in light of the prerequisites for employment, not in contravention of them.[45]

We also reject the appellants' contention that this plan is constitutionally infirm because it somehow "unnecessarily trammels" the interests of the white officers. While a preference system which requires the outright discharge of white employees or creates an absolute bar to all advancement may be regarded as an undue burden on those white employees, we have neither of those situations in the instant case. We have already indicated that the mere fact that non-minorities bear some burden in effectuating the state's goals does not command a conclusion that the plan is unreasonable. Concern for the interests of white employees is not meant to operate as a bar to the achievement of those legitimate goals. *See Detroit Police Officers Association* v. *Young*, 608 F.2d at 696. Where, as here, the plan does not mandate the promotion of unqualified candidates, a significant number of white employees have been promoted under the plan, the operation of the plan does not otherwise hinder the rights of these employees and the plan is merely of a temporary nature, we find that the interests of the white officers have not been "unnecessarily trammeled."[46]

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[45] *Baker* v. *City of Detroit*, 483 F.Supp. at 988-92.

[46] The plaintiffs have argued that the plan unnecessarily burdens white employees because, at the promotion level, particular white employees must directly feel the impact of its operation. They claim that the expectations of identifiable white officers are destroyed when they take, and receive, a qualifying score on the written exams and still are denied promotions. The appellants draw a distinction between this situation and that at the hiring level where the impact is diffused and it is unclear whether a given minority applicant was hired in place of a given white. For the reasons detailed in the district court opinion, we reject this contention and choose not to "take a jaundiced view" toward affirmative action in promotions. *Baker* v. *City of Detroit*, 483 F.Supp. at 985.

We affirm the district court's determination that the use of a 50/50 ratio and the establishment of a fifty percent end goal to be achieved by 1990 is reasonable in all respects. Therefore, in light of our conclusions that there was a substantial governmental interest served in establishing the plan and that the plan does not unduly stigmatize any individual or group, we find that the Detroit plan is constitutionally permissible.[47]

IV

In addition to the appellants' central attack on the affirmative action plan itself, a number of other assignments of error have been raised with regard to the various rulings made by the district court in this matter. The appellants contend that the district court erred (1) in dismissing the plaintiffs' complaint for money damages other than back pay, (2) in denying their request for a jury trial on the various issues relating to the validity of the affirmative action plan, and (3) in incorporating the voluntary plan into its final decree.

A. Dismissal of Complaints For Money Damages under § 1983

In an order dated September 5, 1979, the district court granted the defendants' motion for partial summary judgment and dismissed the plaintiffs' claims under 42 U.S.C. § 1983 for all monetary damages other than back pay. *Baker* v. *City of Detroit*, 483 F.Supp. 919 (E.D. Mich. 1979). In that order, the court concluded that the defendants possessed qualified good faith immunity and, therefore, could not be held liable for damages under § 1983. The appellants now contend that in light of the Supreme Court's subsequent decision in

[47] As noted, the conclusion is also determinative of the appellants' Title VII complaint.

Owen v. *City of Independence*, 445 U.S. 622 (1980), the district court's decision was erroneous as a matter of law.

In *Owen*, the Court specifically held that a municipality has no immunity for its constitutional violations and that it may not assert the good faith of its officers or agents as a defense to liability under § 1983. *Id.* at 638. This intervening Supreme Court decision clearly undercuts the basis of Judge Keith's decision to grant summary judgment on these issues. It does not, however, require this Court to refuse to give effect to an ultimate ruling against the plaintiffs on their § 1983 damage claims.

The issue of qualified good faith immunity is relevant in this case only insofar as it may affect the plaintiffs' right to recover damages based on injuries for which the city is liable. We have, however, upheld Detroit's affirmative action plan, concluding that the city has no liability and that the plaintiffs are entitled to no relief. As such, whether or not the plaintiffs would otherwise be barred from relief is no longer an issue in this case. Accordingly, we decline to reach the question of qualified immunity presented here.

B. Right to a Jury Trial

On July 31, 1978, the district court entered an order denying the plaintiffs' demand for a jury trial. *Baker* v. *City of Detroit*, 458 F.Supp. 379 (E.D. Mich. 1978). The appellants now claim that that ruling was erroneous and had the effect of violating their constitutional right to a jury trial under the Seventh Amendment.[48] We find, however, that the issue of the validity

[48] The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

of an affirmative action plan is a question of law, to be determined by the court and not the jury. *Setser v. Novack Investment Co.*, 657 F.2d 962, 969-70 (8th Cir. 1981)(*en banc*). A variety of factors militate in favor of this conclusion.

First, the fact of prior discrimination and the factual circumstances surrounding the operation of this plan were either uncontested or previously determined in our decision in *Young*. The task before Judge Keith was to determine whether, in light of that record, redress was justifiable and/or the method chosen for that redress was valid. Determinations which do no more than attach constitutional significance to historical facts are conclusions of law. *See Downing v. Williams*, 624 F.2d 612, 617 (5th Cir. 1980); *cf. Glasson v. City of Louisville*, 518 F.2d 899, 903 (6th Cir. 1975).

Second, in order to assess the validity of an affirmative action plan, a variety of factors must be considered and evaluated in light of the nature of the past discrimination and all factors relating to the particular method chosen. The Supreme Court's refusal to adopt bright line standards to guide the lower courts and the consensus among the Circuits that an application of strict standards is therefore inappropriate, emphasizes the degree to which this evaluation is to be a flexible one. *See Setser v. Novack Investment Co.*, 657 F.2d at 696. The inherent uncertainty in the law in this area, when combined with the magnitude of the issues to be resolved, places the necessary determinations in these cases peculiarly outside the practical abilities and limitations of the jury. *Id.; cf. Ross v. Bernard*, 396 U.S. 531 (1970).

Third, questions in this case regarding the Board's findings of past discrimination are analogous to cases in which the court reviews the decision of an administrative body in order to insure that its actions are within constitutional and statutory limits. Although the district court under § 1983 gave *de novo* review to the Police Board's action, it was still es-

sentially reviewing the findings and conclusions of an administrative agency taken upon notice and due deliberation after formal hearings were conducted. Neither federal nor state courts have traditionally used juries to review and resolve disputed questions of fact in this context. *See* Jaffee, *Judicial Control of Administrative Action* 548-49 (1965); Stern, *Review of Findings of Administrators, Judges and Juries*, 58 Harv.L. Rev. 70 (1944).

Had the district court determined, in the liability phase of this trial,[49] that the Board had wrongfully discriminated against white officers in adopting the affirmative action plan, it may have then been appropriate to impanel a jury to determine disputed questions of fact on the issue of whether the city had engaged in the discrimination against white officers as a part of a "custom or policy" under *Monell* v. *New York City*, 436 U.S. 658, 690-95 (1978), and whether the individual defendants acted in good faith under *Owens* v. *City of Independence*, 445 U.S. 622, 657 (1980). The case, however, never reached that stage since the district court found, and we agree, that the Board did not act wrongfully in the first instance.

Finally, as the district court noted, "the gravamen of this action is injunctive relief and back pay for alleged employment discrimination." *Baker* v. *City of Detroit*, 458 F.Supp. at 383. The question of whether the city and its officials committed a constitutional tort under § 1983 which would justify damages, arises in this case only incidentally and only after the district court has determined whether it should enjoin the plan as invalid under Title VII and the Fourteenth Amendment. The fact that the parties stipulated to a bifurcation of the trial emphasizes this result. In order to establish the right to damages arising under § 1983, the plaintiffs would be required

[49] The parties, by stipulation, agreed to a bifurcation of this trial, with the issues of liability to be determined before the reaching of damage questions.

to go beyond showing unconstitutional reverse discrimination; the bad faith of the individuals and the question of whether the city had acted according to a "custom or policy" would yet need to be resolved. The district court's adjudication of the equitable issues relating to the statutory and constitutional validity of the plan logically must come prior to the § 1983 damages issue. In such instances, our common law heritage does not suggest that a jury should have been employed to deal with the wholly equitable phase of the court's determination.[30]

C. District Court's Final Decree

On November 17, 1980, the district court "adopted a rule of law" which had the effect of incorporating the Board's plan, as it was then in operation, into the final judgment. *Baker* v. *City of Detroit*, 504 F.Supp. 841, 846-48 (E.D. Mich. 1980). For the reasons enumerated below, we find that the district court's decision to protect this plan was appropriate.

In examining the propriety of this "rule of law," we must carefully define what we interpret the effect of that ruling to be and the particular circumstances which we find justify such a result in this case.

This case began with a consideration of what a governmental employer *may voluntarily* do in an effort to remedy prior discrimination. Since we do not now hold that the bounds of constitutionally *permissible* action are coexistent with what a governmental employer may be constitutionally *required* to do, it would appear that freezing a voluntary plan

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[30] Affirmative action plans may be objected to under Title VII, § 1981, § 1983 and the Fourteenth Amendment. The unique nature of the questions involved in determining the validity of any given program requires unique forms of analysis in each of these areas. Our decision today upholding the district court's denial of a jury trial in the affirmative action context in no way reflects upon a plaintiff's right to a jury trial in other § 1983 contexts; we do not now go beyond the issue put before us.

into an immutable decree may be inappropriate. Such a result may effectively remove some of the discretion over the implementation of affirmative action plans which is to be afforded those dealing with the realities and problems of the employment context, even where governmental employers are concerned. *See United Steel Workers of America* v. *Weber, supra; LaRiviere* v. *EEOC, supra.* There is also a danger of removing some of the incentive to adopt broad plans because of a fear of being locked into more than an involuntary judicial decree would otherwise require. The district court's final order in this case does not operate to "freeze" this plan, however, and, hence, does not give rise to such concerns.

The district court likened its decision in this case to one which approximates the situation which exists when a court enters a consent decree approving jointly agreed to affirmative action plans. In those cases, the court effectively retains jurisdiction over the operation of the plan in order to assure that (1) the parties have a forum in which to object to actions which appear to violate the terms of the decree, and (2) no changes in the plan will be implemented unless the court determines that those changes are consistent with the purpose of that decree. The court's order in this case merely operates to protect the Board's plan from inappropriate changes or collateral attacks which would vitiate its effect. Rather than discourage voluntary action, then, the decision to incorporate this plan into a judicial decree is likely to encourage it. Those, like the Board, faced with the decision of whether or not to adopt any affirmative action may more readily do so if they can be assured that their efforts, once deemed proper by a federal court, will be protected from a mere changing of the guard or from future attacks which they would be required to fend off. Retaining jurisdiction will provide this protection while not completely tying the Board's hands with regard to appropriate future alterations.

The facts of this case indicate that such retention of juris-

diction is particularly appropriate. After making extensive findings regarding the existence of prior discrimination in and by the Detroit Police Department, the district court found that not only was the Board's plan itself constitutionally permissible, but that *some* affirmative action remedy was actually constitutionally required. Continuing jurisdiction is the only logical approach to such a case. In this way, some degree of discretion over the voluntary plan is retained by those adopting it while, at the same time, allowing the court to insure that the plan will, at minimum, satisfy what the Constitution requires.

This approach will also promote judicial economy. Further factfinding and court proceedings would otherwise be necessary if the plan were abandoned and black officers compelled to sue for *some* remedy, or further attacks on the plan were to be made, and defendend against, in state court. The record clearly reflects hostility toward the Board's plan and a desire to pursue any colorable state or federal claims in opposition thereto, even in the face of extensive judicial considerations of all issues presented. We cannot blink at this reality.

Accordingly, we affirm the district court's final order insofar as it operates to retain jurisdiction over the operation of, and changes in, the Board's affirmative action program for promotion to the rank of lieutenant.[51]

V

Challenges to affirmative action plans present a number of difficult and sensitive issues with which courts must struggle. It is in cases like this one, however, where the facts so clearly establish the presence of calculated, prior discriminatory prac-

[51] Given our characterization of and justification for this element of the district court's order, it appears that the dissent simply misconstrues this portion of the opinion. Additionally, since the retention of jurisdiction is merely for the purpose of guarding against *impermissible* changes in the plan, the notion that the plan is itself discriminatory against blacks is clearly without merit.

tices, that the need for such remedial programs is most acute. Upon careful examination of the plan adopted by the Police Board, we are convinced that it is a valid, legitimate response to this identifiable discrimination and that as implemented it falls within the permissible bounds of Title VII, § 1983 and the Fourteenth Amendment. We therefore affirm the district court's order upholding the plan and approve the decision to protect that plan by continuing jurisdiction over its operation.

Since we also find that the determination of the validity of an affirmative action plan is a question of law for the court and not for the jury, and that the appellants' claim for § 1983 damages has been mooted by our resolution of the liability issues, all of the district court's orders relating to this matter are hereby AFFIRMED.

CELEBREZZE, Senior Circuit Judge, concurring in result.

The issue regarding the appropriate constitutional analysis in a benign discrimination case was addressed by this court in *Detroit Police Officers Assoc.* v. *Young*, 608 F.2d 671 (6th Cir. 1979). I believe that this court's opinion in *Young* is the controlling precedent in this instance and that the constitutional analysis contained in *Young* is consistent with the judgment of the district court. Therefore, I agree that the judgment of the district court should be affirmed.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I concur in Sections I, II.A, III, IV.A and IV.B of the opinion filed by Judge Jones for the Court. I do not concur in the reasoning of Sections II.B or the result or the reasoning of Section IV.C.

I. THE COURT HAS NO POWER TO MAKE THE AFFIRMATIVE ACTION PLAN MANDATORY

In Section IV.C of the opinion, the Court, affirming the opinion of the District Court, has ordered the City to enforce a plan requiring the Police Department to hire or promote a white officer for every other job opening. The plan governs all hiring and promotion in the Police Department. If the City of Detroit has two vacancies in the Police Department, it may not hire or promote two blacks or two whites depending on availability and qualifications. The Court has ordered that the City must always fill the two vacancies with one black and one white. Our Court's order, like the District Court's order to this effect, is irrational and constitutes an illegal exercise of judicial power.

Today, according to the latest dicennial census, Detroit's population is more than 63% black. According to the census, Detroit has a population of 1,203,339 people, 758,939 of whom are black and 413,730 of whom are white. *See* General Population Characteristics for Michigan, 1980 Census, PC80-1-B24, United States Bureau of Census, Table 44, page 24-418. A court-ordered plan that forbids the City from hiring or promoting blacks in proportion to the population and labor pool appears patently discriminatory against the black citizens of Detroit. The City is 63% black, but by federal court order the Police Department may not be more than 50% black.

The District Court got itself into this strange situation because it held that if an "affirmative action plan is upheld," then "the approved plan should be treated as a court judgment, just as a consent decree is. It is this *rule of law* which this court

will adopt." (Emphasis added.) The District Court went on to say that "affirmative action is required, not merely permitted" and "must have the force and effect of an order of this Court." (Final opinion, Nov. 17, 1980, Technical Record, Vol. V, Document 129, pp. 6-8.) Where such a "rule of law" comes from, neither this Court nor the District Court tries to tell us. I know of no justification for such a "rule of law." None is cited. Even if the plan does not now appear to discriminate against black citizens of Detroit, there is no justification for writing the plan into federal law by judicial decree. To extend constitutionally mandatory status to the City's plan distorts the nature of the proceedings below. This action was brought by white police officers who believed that they have been victimized by an illegal affirmative action pilot program. The City defended by demonstrating the history of departmental discrimination against blacks, a history that provided the justification for the plan. The issue at trial was never whether this history required the City to adopt precisely this plan. Rather, the Court had to decide whether – in light of the past – the City was justified in pursuing the new policy. The District Court resolved this issue in favor of the City. For the City, having devised the plan, now to surrender further responsibility to the Court is anomalous. The City is the responsible front line actor and should remain the institution politically accountable for its policies.

I would vacate the order of the District Court in this respect and remand the case to the District Court with instructions to consider what should now be done with the affirmative action plan in light of 1980 census figures indicating that the plan discriminates against blacks.

II. THE COURT DOES NOT STATE THE CORRECT TEST OF CONSTITUTIONALITY UNDER THE FOURTEENTH AMENDMENT IN SECTION II.B OF ITS OPINION ALTHOUGH IT APPLIES THE CORRECT TEST IN SECTION III OF THE OPINION

In assessing the validity of the voluntary governmental affirmative action plan in question, the Fourteenth Amendment requires a more exacting standard than the open-ended, mere "reasonableness" standard stated by the Court. In order to be valid, a non-Congressional, governmental, affirmative action plan must meet the following exacting procedural and substantive standards under the *Bakke* and *Fullilove* cases:

1. *Procedural standard.* – After rational and deliberative consideration, a governmental agency competent to make findings concerning racial discrimination by the governmental institution in question must make valid and supportable findings of prior discrimination, and it must make valid findings concerning the percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination.

2. *Substantive standard.* – These findings by a competent governmental agency must fully justify the percentage of minority members to be given preference under the affirmative action plan and the duration of the program, and the remedy incorporated in the affirmative action plan must not unduly burden or harm innocent parties in light of other available remedies.

Although the Court states the standard under the Fourteenth Amendment in far less exacting language than this, the Court in fact applies this very set of standards in Section III of its opinion. I, therefore, concur in the Court's conclusion that – in light of the information available in 1974 – the Detroit Board of Police Commissioners' findings justified the remedy it adopted.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-1837

HANSON BRATTON, et al.
Plaintiffs-Appellants,
and
UNITED STATES OF AMERICA,
Applicant for Intervention,
versus
THE CITY OF DETROIT, et al.,
Defendants-Appellees,
and
GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

CERTIFICATE OF PUBLIC IMPORTANCE

The Attorney General of the United States hereby certifies to this Honorable Court that the United States has determined this case to be of general public importance in accordance with the provisions of Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-(f)(1), and of Section 902 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000h-2.

/s/ WILLIAM FRENCH SMITH
William French Smith
Attorney General of the
United States

April 28, 1983

No. 80-1837

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed May 27, 1983)

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA,
Applicant for Intervention,

v. ORDER

THE CITY OF DETROIT, MICHIGAN,
Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

BEFORE: MERRITT and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

The United States of America, through the Civil Rights Division of the Justice Department, has requested leave to intervene as a party appellant and to file a suggestion of rehearing *en banc* in excess of the normal page limit. The City of Detroit, defendants-appellees, and the Guardians of Michigan, intervening defendants-appellees, have filed oppositions to that request. Upon consideration of all issues raised, arguments presented and interests claimed, we find that the government's interest can be adequately protected via participation as an *amicus curiae* and that the interests of all others involved, including the Court, will be best served by a denial of the request to intervene at this late date. Accordingly, while

the United States is free to request the right to file an *amicus* brief with this Court if and when a rehearing of this cause should occur, the motion to intervene as a party appellant is hereby DENIED.

The issues in this case have been fully and quite competently briefed and argued by the parties involved, including parties who sought, and were granted, the right to intervene at a much earlier time. Those issues have been carefully considered by this panel and a petition for rehearing and/or rehearing *en banc* is now pending before the panel and the full Court, respectively. There is no reason to believe that the presence of a new party is required at this point for the Court to be capable of a proper resolution of the issues it has already begun to consider.

A prior panel was faced with many of the same considerations in *Detroit Police Officers Association v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981). In fact, the affirmative action analyzed in *Young* arose out of the *very same plan* the Court has been asked to review in the present case. In *Young,* the Justice Department joined in an *amicus* brief filed by the Equal Employment Opportunity Commission requesting that the plan be upheld in the face of challenges under Title VII and the Fourteenth Amendment. The government's interest was then fully considered. The panel majority in this case specifically followed the standards set out in *Young.* If the government wishes to argue that its position has somehow shifted since the *Young* decision, surely that can be accomplished by virtue of another *amicus* presentation to the Court, as was permitted in *Young* and has recently been permitted by the Supreme Court in *Boston Firefighters Local Union No. 718 v. Boston Chapter, NAACP* (S.Ct. Nos. 82-185, 82-246, 82-259).

The harm to the parties opposed to the government's intervention, and the harm to the proper administration and

disposition of such a major suit, so long pending before this Court, simply outweighs any claimed harm to the government's Title VII enforcement interests.[1] The plaintiffs have shown a clear inclination in the past to fully and vigorously argue all relevant issues and have expressed their intention to pursue this case through all available channels, including a petition for rehearing *en banc* in this Court and an application for *certiorari* in the Supreme Court. While the government's newly-injected presence as an *amicus curiae* at those stages may prove helpful, its presence as a party at this point is unwarranted.

The United States may request the right to present its arguments to the Court as an *amicus curiae* if and when the full Court should deem a rehearing appropriate. The request to intervene as a party appellant and, therefore, to file a suggestion for rehearing is DENIED.

---

[1]We note that the Justice Department's claim in this regard lacks much of the weight it might otherwise carry given the conflict between the position the Department has taken here and that taken by others vested with enforcement powers under Title VII, particularly the Equal Employment Opportunity Commission.

No. 80-1837

BRATTON v. CITY OF DETROIT

MERRITT, Circuit Judge, dissenting. The United States through the Attorney General has certified that this case is a civil rights case of "general public importance" under 42 U.S.C. § 2000h-2 (1976), and thus the government is entitled to intervene as a matter of right "upon timely application." The Attorney General sought to intervene under this statute a few days after receiving our Court's opinion in this case. We have uniformly permitted the United States to intervene in other civil rights cases, and I would not deny the government that right now. The government's arguments may or may not have merit, but its right to be heard seems clear. I, therefore, respectfully disagree with the opinion of the Court denying intervention.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Received May 22, 1983)

No. 80-1837

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA,
Applicant for Intervention,

vs.

THE CITY OF DETROIT, MICHIGAN, et al.,
Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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STATEMENT OF ISSUES PRESENTED

The questions presented in this appeal have been previously stated in Plaintiffs Brief on the Merits. This petition for rehearing and suggestion for rehearing *en banc* focuses upon the following issues:

(1) Whether the Panel erred by misreading the record evidence and, more particularly, in failing to comprehend the relevant labor market data showing that the promotional quota far exceeds its purported remedial nature?

Additionally, Plaintiff hereby adopts by reference the questions presented and brief in support thereof filed by the United States of America on April 29, 1983. The questions presented therein are as follows:

(2) Whether, in the circumstances of this case, a municipal police department may constitutionally adopt a requirement that one black police sergeant be promoted to the rank of lieutenant for each white police sergeant so promoted until blacks constitute 50% of police lieutenants?

(3) Whether, the District Court erred in incorporating into a judicial decree the municipal police department's one-to-one racial quota for promotions to the rank of lieutenant?

STATEMENT OF THE CASE

On March 29, 1983, a Panel of this Court rendered its opinion upholding an affirmative action promotional quota at the rank of lieutenant in the Detroit Police Department. The quota for promotion to lieutenant is part of a Department-wide affirmative action policy adopted by the Detroit Board of Police Commissioners in 1974. However, this appeal *only* involves promotions to the rank of lieutenant since November of

1975 — and should not be confused with promotions to the rank of sergeant in the related case of *Detroit Police Officers Assoc.* v *Young*, 608 F 2d 671 (6th Cir, 1979).

The statement of the course of proceedings and disposition of the case by the Panel and the suggestion of rehearing en banc for the United States as Intervenor-Appellant is hereby adopted by Plaintiff by reference pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure.

SUMMARY OF ERRORS

As set forth in Plaintiff's Petition for Rehearing, the Panel decision in this case is replete with errors indicative of a fundamental misreading of the record evidence as set forth in the briefs of both sides submitted to the court. While all of these errors are impossible to detail in this petition for rehearing, the Court's errors and misstatements of the record evidence are summarized below.

1. The Panel erroneously placed great reliance on City-wide general population figures notwithstanding the fact that the more precise relevant labor market data in the record shows that substantial proportions of the general population are not qualified for the job of police officer.

2. The Panel states its belief that the relevant labor market data was compiled by the Plaintiffs when in fact all such data was presented by the City. Mr. Fechter was the City's expert — not the Plaintiffs.

3. The Panel repeatedly refers to a 50% or 30% proportion of black lieutenants as being the appropriate end-goal, when the City's expert at his most optimistic clearly contradicts this figure. He determined that absent discrimination the lieutenants ranks would be no more than 25%

black as of June, 1978. The Panel fails to even mention his testimony in this regard.

4. Judge Merritt in his partial dissent states the constitutional standard as requiring "valid findings concerning the percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination." (Slip Op, at 45). The Panel ignores this standard along with the record evidence demonstrating this standard clearly cannot be met.

5. While completely failing to mention Mr. Fechter's analysis of the lieutenants ranks, the Panel erroneously reproduces a table dealing with the relevant labor market at the entry level and yet discusses it in the context of the lieutenants ranks. In fact, this table has no bearing (Slip Op, at 28) to the arguments which precede it and follow it.

6. The Panel even enters new data into the record (Slip Op, at 17) dealing with comparative statistics at the entry level and the rank of sergeant. Given an 80% hiring quota and an uncontested quota for promotion to the rank of sergeant — not at issue in this case — the data reproduced is largely immaterial. The data also distorts the record by omitting the large numbers of black command officers above the rank of lieutenant.

7. The Panel erroneously attributes arguments to the Plaintiff which were never made in the District Court or in this Court. Apparently confusing this record with the related case of *Detroit Police Officers Assoc.* v *Young, infra*, the Panel erroneously states that the Plaintiffs "contended that the relevant labor market figures were the figures for the Detroit Metropolitan Area, figures which would justify a much lower percentage of blacks in the Police Department than the figures for the City of Detroit." (Slip Op at 26). Further, the Panel accuses Plaintiffs of shifting grounds on

appeal, noting that "Appellants no longer contend that the Metropolitan Area statistics are controlling." (Id). In fact, Plaintiffs never made any such assertions, and as noted above, did not even introduce any relevant labor market data into the record.

8. The Panel clearly errs in stating that "there is no doubt that the inference of intentional discrimination which arises from the severe statistical disparity is an accurate one." (Slip Op at 16). In fact, the findings of the City's own expert show a relatively small disparity of blacks than would be expected absent discrimination at the time the quota was implemented. Under the City's most optimistic estimate, absent discrimination the lieutenants ranks would have been no more than 18% black in 1973 as compared to the actual number of 5% black — a difference of only 13% assuming a race-free environment since 1945. The suggestion by the Panel of a "severe statistical disparity" ignores the labor market data and the analysis presented by the City itself.

9. In considering the above, one must conclude that the Panel did not understand the difference between population or census figures and labor market figures. In fact, the Panel fails to adequately discuss the statistical data presented in the briefs of both parties.

ARGUMENT AND AUTHORITIES

Plaintiffs submit that the Panel decision in this case is erroneously based upon a misreading of the record evidence coupled with a basic misconception of the appropriate use of statistics in employment discrimination cases. The Panel's most obvious error is its reliance on general population figures notwithstanding record evidence demonstrating that the

general population of the City of Detroit is vastly different from the actual pool of qualified job applicants.

This critical error indicates that the Panel completely failed to comprehend the nature of the relevant inquiry posed by the labor market analysis performed by the City's own expert based on those qualified applicants who actually applied for the job. This goes to the heart of the constitutional standard articulated by Judge Merritt in his partial dissent: "An agency competent to make findings . . . must make valid findings concerning the percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination." (Slip Op. at 45).

As will be demonstrated below, the opinion in this case leads inevitably to the conclusion that the Panel did not understand the difference between population or census figures and labor market data. It is submitted that this error is so basic — and has such severe consequences for those directly affected — that the questions presented are appropriate for review by the full court, sitting *en banc*.

A. THE PANEL CLEARLY ERRED IN RELYING ON GENERAL POPULATION FIGURES THAT INCLUDE SUBSTANTIAL SEGMENTS OF THE POPULATION WHO CANNOT OR DO NOT WISH TO SEEK EMPLOYMENT, OR ARE OTHERWISE NOT QUALIFIED FOR EMPLOYMENT AS POLICE OFFICER OR POLICE LIEUTENANT

The Panel in this case errs in its sweeping statement that "the Supreme Court has approved the use of racial composition comparisons between employers' work forces and the general area-wide population as probative of discrimination in

employment discrimination cases . . . " (Slip Op. at 32). To the contrary, in both cases cited by the Panel in support of this proposition the Supreme Court has specifically warned against the use of general population figures where the population does not possess the qualifications for the job in question. *Hazelwood School District* v *United States*, 433 US 299, 308 (1977); *Int'l Brotherhood of Teamsters* v *United States*, 431 US 324, 339 (1977).

In *Teamsters*, *supra*, the Court specifically noted the limited probative value of general population figures where there is evidence showing that such figures are not reflective of qualified job applicants in the relevant labor pool. 431 US at 340, n. 20. Similarly, in *Hazelwood School District* v *United States*, *supra*, the court commented on the use of general population figures in the *Teamsters* case as follows:

> "In *Teamsters*, the comparison between the percentage of negroes on the employer's work force and the percentage in the general area-wide population was highly probative because the job skill there involved — the ability to drive a truck — is one many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have *little probative value*." 433 US at 308, n. 13 (emphasis added).

In *Hazelwood*, the Supreme Court remanded with directions to the lower court to determine the relevant labor market. 433 US at 313. Subsequent to the decision in *Hazelwood*, numerous courts, including this court, have consistently held that the statistical comparison must be with the relevant labor market and not the general population, which includes people who are obviously disqualified from employment because of age or other disability, as well as persons that do not have the qualifications for the position. See *Alexander* v *Aero Lodge No. 735*, 565 F 2d 1364 (6th Cir, 1977); *EEOC* v *Local 14, International Union of Operating Engineers*, 553 F 2d 251 (2d Cir, 1977).

In *Perham* v *Ladd*, 436 F Supp 1101 (N.D. Ill. 1977), the District Court rejected statistics that did not constitute a comparison with the relevant labor market:

> "[T]he Plaintiff must, at the very least, make a comparison between the sexual composition of the teaching staff of Chicago state and the sexual composition of the qualified teacher and administrative population *in the relevant labor market*." 436 F Supp at 1106 (emphasis added).

Indeed, common sense teaches that it is inappropriate to base any finding of discrimination on undifferentiated general population figures which do not in any way indicate how many persons exist in that population with the requisite qualifications for the job. For example, persons convicted of crime, drug users, or other emotionally unstable individuals are clearly not eligible for employment as police officers or police lieutenants. In fact, the City's expert on relevant labor markets unequivocally testified that it is essential to define the relevant labor market in order to determine any racial disparities in the employer's work force. He testified:

Q. Now, in determining whether an employer's work force accurately reflects the availability of persons by race, you would consider it essential to define relevant labor market, is that your testimony?

A. Yes.

Q. Now, in this case, you have in fact attempted to define the relevant labor market, have you not?

A. Yes.

Q. And isn't it true that the relevant labor market, based on your analysis is not synonymous with the City of Detroit? And by that I mean the population of the City of Detroit?

A. Yes. That's correct.

Q. In fact, it would be erroneous to assume that the relevant labor market is the population of the City of Detroit, would it not?

A. Yes, it would be erroneous.
(App. 6457).

In other words, the testimony of the City's expert is consistent with applicable law holding that racial disparities in an employer's work force must be judged by reference to the relevant labor market for the particular job in question. As will be demonstrated below, the Panel's reliance on general population figures is totally inappropriate and leads to a clearly erroneous conclusion.

B. THE USE OF GENERAL POPULATION FIGURES HAS NO PROBATIVE VALUE ON THE QUESTION OF DISCRIMINATION BECAUSE THE POPULATION IS UNSTABLE AND HAS CHANGED RAPIDLY FROM PREDOMINATELY WHITE TO PREDOMINATELY BLACK

The dangers associated with the misuse of general population figures is nowhere more apparent than in this case. The fallacy of this approach is readily demonstrated by considering a *hypothetical city* where the racial proportions have changed as rapidly as in Detroit — but which has never experienced any racial discrimination. According to the City's expert, Mr. Fechter, the labor pool in the years 1950, 1960 and 1970 was 12% black, 21% black and 43% black. If officers were hired at the average age of 20 without regard to race (and at random from the qualified labor pool) then in 1980 the fifty-year old officers would be 12% black, the forty-year old officers would be 21% black, and the thirty-year old officers would be 43% black. A similar pattern would exist for all ages in between. Given that the City was 63% black in 1980, this would (according to the City and this Court) illustrate a clear example of discrimination against blacks despite the fact that the selection of applicants in this hypothetical was at random from the labor pool.

Accordingly, by basing the 50/50 quota on the racial composition of the general population as of 1974, the City is led into the absurd result noted by Judge Merritt in his dissent. That is, the 50/50 quota appears discriminatory against blacks when one considers that the City is now 63% black. In other words, the use of general population comparisons as the benchmark for discrimination leads inevitably to the conclusion that the only acceptable ratio for promotion to the rank of lieutenant is one which varies each year according to the latest population figures.

The problem here clearly lies in the fact that Detroit's population is highly unstable by race. With a stable population one *would* normally expect the employer's work force to reflect that population. However, in an unstable and rapidly changing population this is clearly not true. For example, suppose that the population of Detroit continues to increase at the current rate until it is 99% black. Suppose further that this happened in the next ten years; and that during this ten years the Department promoted nothing but blacks to the rank of lieutenant. Query: how long would it take for the ranks of lieutenant and above to reflect the general black population of 99%? Clearly, such a result would not pertain until virtually *all* of the current majority white career officers reached retirement age. Assuming that the age of white command officers averages thirty-five, it would take an additional 25-30 years before the command officers reflected the 99% black general population.

It seems obvious that a police force of mostly thirty year career officers cannot possibly reflect a rapidly changing population that went from 11% black in 1950 to 63% black in 1980. In other words, Detroit's black population increased by over 500% in the relatively short span of 30 years — a timespan that just happens to coincide with the average career of a Detroit police lieutenant.

In summary, the record shows the general population figures of the City of Detroit are but a mere shadow of the relevant labor market of those persons possessing the necessary qualifications for the job. Furthermore, the labor market of Detroit is itself not stable, but is changing as is the population. Thus at any point in time, in the absence of any discrimination whatsoever, the proportion of blacks at the rank of lieutenant will reflect prior patterns in the labor market.

The City's expert, Mr. Fechter, took this into account in his computations of the number of black lieutenants expected under an assumption of race-free hiring and promotion going back to 1945. He specifically found that in the absence of discrimination the lieutenants ranks should have been 18% black in 1973 and 25% black as of June, 1978. These findings have been ignored rather than rebutted.

Finally, the fact that the City now requires employees to be residents of Detroit has no affect on these computations since the relevant labor market for lieutenant is based on years which preceded the imposition of this prerequisite. Thus it is clear that the District Court and the Panel improperly accepted the use of City-wide population figures.

C. THE PANEL MISREAD THE LABOR MARKET ANALYSIS OF THE CITY'S EXPERT SHOWING THAT IN THE ABSENCE OF DISCRIMINATION THE LIEUTENANTS RANKS SHOULD ONLY BE 25% BLACK AS OF JUNE, 1978

In his partial dissent, Judge Merritt clearly states the standards which must be met in order to affirm a voluntary affirmative action plan such as the Detroit plan. He states:

"(1) *Procedural standard* — After rational and deliberative consideration, a governmental agency competent to

> make findings concerning racial discrimination . . . must make valid findings concerning the percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination.
>
> (2) *Substantive Standard* — These findings . . . must fully justify the percentage of minority members to be given preference . . . and the remedy incorporated in the affirmative action plan must not unduly burden or harm innocent parties in light of other available remedies." (Slip Op. at 45).

Under this procedural standard, the City should have been required to perform a labor market analysis prior to its adoption of the promotional quota for the rank of lieutenant, for that is the only way of determining the "percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination."

This standard should be contrasted to the "reasonableness" standard set forth by Judge Jones:

> "The Board *did not employ* an economic or a statistical expert in 1974-75 to determine the relevant labor markets during the period of discrimination. It *did not try* to determine the precise number of lieutenants who would have been hired in the absence of discrimination. It simply concluded that most police officers in the past had come from within the City and that the City was now approximately 50% black." (Slip Op at 25) (emphasis added).

Clearly, the standard applied by Judge Jones falls far short of the constitutional standard stated by Judge Merritt in his partial dissent. How then can Judge Merritt assert as he does that "in light of the 1980 census figures . . . the plan discriminates against blacks." (Slip Op at 44). Likewise, how can Judge Jones assert that "the broad based attack on the use

of city-wide population figures is unsupportable", while at the same time he notes that "this court has specifically held that in the context of challenges to affirmative action, a goal which seeks the same racial proportion among employees as in the *labor force* will ordinarily be reasonable." (Slip Op at 32).

In considering the above, one must conclude that the Panel simply does not understand the difference between population or census figures and labor market figures. Furthermore, it is evident that the court has misread the record. The Panel clearly states its belief that Mr. Fechter was Plaintiff's expert in that he performed labor market analysis for the Plaintiffs.* Mr. Fechter was of course the City's expert. Plaintiff's reply brief clearly mentions him as such and goes into considerable detail on his analysis. (Plaintiff's Reply Brief, p. 4).

In fact, the Plaintiffs did not compile any labor market data whatsoever, but merely used the labor market figure developed by the City and Mr. Fechter "with a lot of blood, sweat and tears." (App. 885). Plaintiff's adjustments of this data followed precisely the methodology used by Mr. Fechter. But the Panel appears to ignore Plaintiff's reply brief and does not even deign to comment on the principal points of the brief.

In particular, the Panel completely ignores the fact that Mr. Fechter did not count the number of blacks who had *made it* to the rank of lieutenant. Instead he only counted the actual number of blacks *remaining* at the rank of lieutenant for each of the two years in question. Given the obvious intention of the City to promote blacks as rapidly as possible, it is inevitable that blacks would remain as lieutenants for only a few years

---

* Judge Jones states that "data to which the Appellants refer is that of their own statistical expert, Mr. Alan Fechter." (Slip Op at 27). This is not only wrong, but the entire context of the opinion makes it clear that this misperception affected the proper evaluation of this unrebutted evidence.

and would be quickly promoted to Inspector and above. (See Plaintiff's Reply Brief, pp. 4-8). The effect of this is quite obvious once one thinks of it, but the Panel totally disregards it and makes no comment whatsoever. Neither does the Panel mention the fact that using the City's own labor market analysis and methodology, there is shown to be an excess of twenty-five (25) black command officers in 1979 than one would expect to find given race-free hiring and promotions since 1945. The three appendixes in this regard are attached hereto for the convenience of the Court.

Instead of focusing upon the unrebutted statistical evidence of the City's own expert, the Panel repeatedly refers to a 50% or 30% proportion of black lieutenants as being appropriate, when the City's own expert at his most optimistic testified to the contrary. According to Mr. Fechter's analysis of the lieutenants ranks, absent discrimination there would have been 43 black lieutenants in 1973 out of a total of 232 lieutenants. (Appendix 1763). In other words, assuming a race-free environment since 1945, Mr. Fechter testified that *18%* of the lieutenants in 1973 should have been black.

This figure of 18% contrasts sharply with the 50% quota adopted the very next year by the Board of Police Commissioners. It also contrasts sharply with the 30% figure invented by the Panel.

Furthermore, as detailed in Plaintiff's reply brief, when one considers total command officers at the rank of Lieutenant or *above*, the actual number of black command officers in 1973 was 23 out of a total of 325. This is a ratio of 7%; while the hypothetical number based on Mr. Fechter's own data was 40 out of 325, a ratio of 12%. The difference is only 17 officers. In fact, the difference is almost entirely made up by the uncontested promotion of 11 black officers in 1974 prior to the institution of this action.

The Panel's suggestion that absent discrimination the lieutenants ranks would have been 50% black in 1974 is patently unreasonable and totally ignores the labor market data and the testimony of the City's own expert. As noted, even Mr. Fechter's optimistic view (which ignores black officers above the rank of lieutenant) posits a hypothetical number of lieutenants of 43, a ratio of 18%. Thus any suggestion by the Panel that the percentage of black lieutenants should be 50% or even 30% is totally inconsistent with the record evidence.

In addition to focusing on 1973, Mr. Fechter did a similar analysis to determine if there was any disparity between the actual and expected number of lieutenants as of June, 1978. Mr. Fechter testified that his analysis showed that 49 out of 194 of the lieutenants in 1978 should have been black. (App. 6447, 1764). In other words, absent discrimination the lieutenants ranks should have been 25% black as of June, 1978. In fact, there were only slightly fewer, 41 out of a total of 194, or 21%.*

Mr. Fechter testified in this regard that the difference between the expected and actual number of black lieutenants in 1978 was negligible, i.e. was not statistically significant. (App. 6534). Nonetheless, the District Court erroneously relied on this difference as being a real difference, even though Mr. Fechter testified that it was not.

It must be stressed that the Panel decision completely ignores these unrebutted findings by the City's own expert. Instead, the Panel merely states that: "Even the use of a guideline which exceeds the percentage of minorities in the population would be justifiable as a temporary measure for attaining an appropriate endgoal." (Slip Op at 30). One could well ask

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* This 21% figure does not include 7 additional black female lieutenants. (App. 1454).

how a goal which leads to a much higher proportion of blacks than in the labor market can possibly be considered "appropriate". Such an argument flies in the face of Mr. Fechter's unrebutted finding that all prior discrimination had been fully remedied at the lieutenants ranks no later than June of 1978.

Without mentioning these unrebutted findings by the City's own expert, the Panel instead attempts to evade them by stating that "we do not believe that marginally increasing the percentage of black lieutenants above the figure that would exist had hiring been nondiscriminatory is an unreasonable remedy for redressing this wrong." (Slip Op at 31). The Panel attempts to bolster its argument in this regard by stating that:

> "The 1974 affirmative action plan was dedicated to redressing all deleterious effects of the Department's prior practices. The redress of this injury to the black population as a whole justifies a plan which goes beyond the 30% work force limitation which Appellants imply may have been appropriate." (Slip Op at 31).

Significantly, the Panel does not state what legal authority justifies the redressing of any injuries to black citizens by altering an otherwise racially unbiased promotion system. This goes far beyond the standard of constitutionality stated by Judge Merritt.

Moreover, the Court's theory of redressing any and all prior injuries to black citizens totally ignores the remedial efforts instituted by the Department through the use of an 80% hiring quota and a 50% promotional quota to the rank of sergeant. In other words, instead of focusing on the relevant labor market statistics at the lieutenants ranks, the Panel presents itself with the far easier task of generalizing to the Department as a whole. This case does not deal with black police officers generally, but rather with a promotional quota to the rank of lieutenant *only*.

Finally, it is simply ludicrous to say that white candidates have equal access to promotion (Slip Op. at 21) when a 50/50 quota is imposed on a promotional system that in itself has an adverse impact on white promotional candidates.* The fact that there were more white lieutenants than black lieutenants in 1974 was due primarily to the fact that blacks in Detroit traditionally represented a small portion of the labor pool. In 1945 this percentage was computed to be 7.8%. (App. 1761). By 1965, when the youngest 1973 lieutenant was hired, the relevant labor pool was only 25% black. Because qualified blacks (as determined by the City, e.g. with a high school education), represented a small portion of the labor pool in Detroit, it was inevitable that they should represent a small proportion of police officers and lieutenants, regardless of whether there was any discrimination in hiring or promotion. If the small proportion of qualified blacks represented discrimination, it was discrimination in society at large, not in the police force. This cannot justify a racial quota. *University of California Regents* v *Bakke,* 438 US 265 (1978).

---

* Whereas the 1973 promotional exam was racially neutral, experts for both sides agreed that the 1974 and 1976 promotional exams had a statistically significant adverse impact against *white candidates* even prior to the imposition of the racial quota. (App. 136-38). Likewise, the 1977 written exam favored the black candidates with a 58% passing rate as compared with a 48% passing rate for white candidates. (App. 106-07).

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Plaintiff/Appellant respectfully requests that the suggestion for a rehearing en banc be granted and the case be restored on the docket as a pending appeal.

Respectfully submitted,
RAMSDELL, OADE & FELDMAN

By: /s/ K. PRESTON OADE, JR.

K. Preston Oade, Jr.
(P28506)
Attorney for
Plaintiffs/Appellants
25130 Southfield, Ste. 100
Southfield, MI 48075
552-9400

Dated: May 2, 1983

APPENDIX ONE

MALE PROMOTIONS BY RACE 1974-78

Date Promoted	Number Promoted
October 1974.....	11 B/M*
	11 W/M
November 1975	10 B/M*
	10 W/M
February 1976.....	5 B/M*
	5 W/M
December 1976.....	16 B/M*
	16 W/M
July 1977.....	7 B/M**
	7 W/M
November 1977	14 B/M**
	14 W/M
January 1978.....	14 B/M**
	14 W/M
	77 B/M
	77 W/M

* Source - Exhibit 165(b)

** Source - Exhibit 167(b)

Does not include promotions in 1979 after the trial.

APPENDIX TWO

Comparison of Racial Composition of Command Officers, Actual And Hypothetical (In A Race-Free Environment), 1979*

Year of Appointment	(1) # Command Off. (work force)	(2) % Nonwhite (Labor pool)	(3) Hypothetical	(4) Actual Nonwhite (work force)
1945-1953**	56	10.4	5.8	10
1954	33	13.6	4.5	1
1955	30	14.2	4.5	5
1956	25	14.9	3.7	9
1957	—	15.5	1.1	0
1958	0	16.2	0.0	0
1959	5	16.8	0.8	1
1960	6	17.5	1.0	0
1961	17	19.1	3.2	4
1962	20	20.7	4.1	3
1963	12	22.3	2.7	4
1964	7	23.9	1.7	2
1965	10	25.5	2.5	5
1966	8	27.1	2.2	7
1967	8	28.8	2.3	7
1968	10	30.4	3.0	8
1969	11	32.0	3.5	9
1970	4	33.6	1.3	2
1971	2	35.2	0.7	0
TOTAL:	271		48.6	74

* Command officers included lieutenants, inspectors, commanders, deputy chiefs and chief.

** Median year (1949) for period 1945-53.

Sources: (1) Exhibit 233
(2) Exhibit 230, Table D-5
(3) = (1) × (2)
(4) Exhibit 233

APPENDIX THREE

Comparison of Racial Composition of Command Officers, Actual And Hypothetical (In A Race-Free Environment), 1973*

Year of Appointment	(1) # Command Off. (work force)	(2) % Nonwhite (labor pool)	(3) Hypothetical	(4) Actual
1945	4	7.8	.4	
1946	6	8.4	.5	
1947	15	9.1	1.4	
1948	14	9.7	1.4	
1949	47	10.3	4.8	
1950	37	11.0	4.1	
1951	39	11.7	4.6	
1952	30	12.3	3.7	
1953	25	12.9	3.2	
1954	30	13.6	4.1	
1955	29	14.2	4.1	
1956	29	14.9	4.3	
1957	4	15.5	.6	
1958	0	16.2	0	
1959	2	16.8	.3	
1960	4	17.5	.7	
1961	3	19.1	.6	
1962	5	20.7	1.0	
1963	0	22.3	0	
1964	1	23.9	.2	
1965	1	25.5	.3	
	325		40.3	23
				+11**
				34

* Command officers includes lieutenants, inspectors, commanders, deputy chiefs and chief.

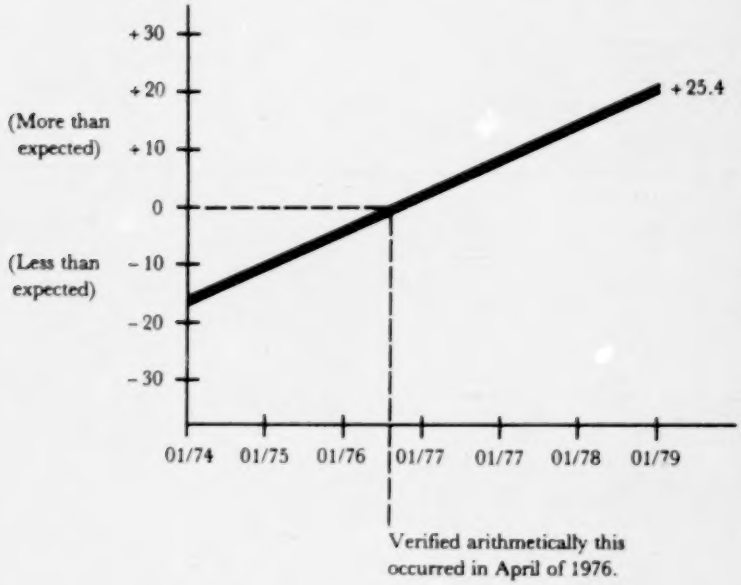
Sources: (1) Exhibit 230, Table F; Exhibit 53
(2) Exhibit 230, Table F, column 1
(3) – (1) × (2)/100
(4) Exhibit 53, as of June, 1974

** Blacks promoted to lieutenant in October, 1974.

APPENDIX FOUR

Linear Interpolation Figure Of Black Command Officers Showing When The Number Expected In A Hypothetical Race-Free Environment Equaled The Actual Number.

(From a shortfall of 17 in 1974 to an excess of 25 in 1979)



IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-1837

HANSON BRATTON, et al,
Plaintiffs-Appellants,

-and-

UNITED STATES OF AMERICA,
Applicant for Intervention,

-vs-

THE CITY OF DETROIT, MICHIGAN, et al,
Defendants-Appellees,

-and-

GUARDIANS OF MICHIGAN, et al,
Intervening Defendants-Appellees.

PROOF OF SERVICE

STATE OF MICHIGAN)
ss.
COUNTY OF OAKLAND)

K. Preston Oade, Jr., being first duly sworn, deposes and says that on the ____ day of May, 1983, he did in fact mail a copy of Appellants' Petition for Rehearing and Suggestion of

Rehearing En Banc to: O. Peter Sherwood, Suite 2030, 10 Columbus Circle, New York, New York, 10019; Warren J. Bennia, 36 West 44th St., Suite 500, New York, New York 10036; and to Charles J. Cooper, Deputy Assistant Attorney General, Department of Justice, Room 5639, Washington, D.C. 20530.

/s/ K. PRESTON OADE, JR.

K. Preston Oade, Jr.

Subscribed and sworn to before me this ____ day of May, 1983.

/s/ CATHERINE LEON

Catherine Leon
Notary Public, Wayne
County, Michigan
My Commission Expires
June 23, 1986

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed June 3, 1983)

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

v.

THE CITY OF DETROIT, MICHIGAN, No. 80-1837
Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

ORDER

BEFORE: MERRITT and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

The appellants have petitioned this Court for a rehearing *en banc* in the above-captioned case. A majority of the Court not having favored such a rehearing, that petition is denied.[1]

---

[1] The United States Government has requested the right to submit an amicus curiae brief in support of the appellant's petition for rehearing *en banc*. In light of the fact that that request was received after a majority of the full court had chosen not to favor an *en banc* rehearing and after the original panel had unanimously agreed to amend the initial disposition of this case, the Government's request is now moot.

The panel has reconsidered its initial position, however, and has determined that Section IVC of the opinion must be withdrawn. Upon further reflection, the panel majority has determined that the fears expressed in paragraph three of that section and in Section I of the dissent cannot be adequately allayed by an attempt to limit the impact of the district court's final order. "Since we do not now hold that the bounds of constitutionally *permissible* action are coexistent with what a governmental employer may be constitutionally *required* to do" (slip op. at 38), we believe that the district court's incorporation of the plan into a final decree was inappropriate and that our initial attempt to narrowly construe the order insufficiently remedied that impropriety. Upon consideration, we agree that in the context of judicial review of a *voluntary* affirmative action plan, the body adopting that plan must remain the "front line actor" primarily responsible for the plan's operation. (Slip op. at 44.)

Accordingly, the panel has chosen to adopt the recommendation of the dissent, vacating the final order of the district court[2] and remanding this cause for further consideration in light of the 1980 census. (Slip op. at 44.)

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

[2] *Baker* v. *City of Detroit*, 504 F.2d 841 (E.D. Mich. 1980).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed August 4, 1983)

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

v. No. 80-1837

CITY OF DETROIT, et al.,
Defendants-Appellees

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees

ORDER

The June 3, 1983 order of the court denying the petition for rehearing *en banc* is hereby supplemented with the dissenting opinion of Circuit Judge Wellford, as follows:

"WELLFORD, Circuit Judge, dissenting. I respectfully dissent from the denial of rehearing *en banc* because I believe that the district court, in approving the affirmative action program in question, inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool. The correct test in determining whether a minority is proportionately represented in a particular occupation is to compare the percentage of the occupation's minority members to the percentage of the eligible and qualified workers who belong to that minority group. The Supreme Court has cautioned against utilizing general population statistics where, as here, only a limited segment of the population qualifies for the position in question. *See Hazelwood School Disctrict v. United States*,

433 U.S. 299, 308 (1977) and *In'tl. Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 339 (1977). At the same time it was, under the circumstances, appropriate that an adjustment should have been made to take account of any prior discrimination which may have resulted in fewer blacks serving as sergeants, in fashioning an affirmative remedy to resolve the difficult problem presented in this case. I believe the entire court should have addressed the problem presented in relying on general population figures which include persons who clearly do not possess qualifications even for an entry level position on the police force and who obviously are not members of the relevant labor force. *See Grano v. Dept. of Dev. of City of Columbus*, 637 F.2d 1073, 1078 (6th Cir. 1980) (decision of J. Keith).

Two apparent portions of the general population at least should have been excluded from any consideration of relevant statistical data in this case. One such area would be those too young and immature to qualify for a position as police lieutenant,[1] and the other aspect of age disqualification would be those too old and physically incapable by reason of age to serve. Another general population group that should have been excluded would have been those who have inadequate education or mental capacity to serve in this important and sensitive position requiring at least some modicum of training background, education and mental or intellectual skills. Census data was available to eliminate those who by reason of age or education were disqualified; it is evident that this was not taken into account by the panel, which therefore disregarded U.S. Supreme Court guidance in this regard:

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[1] In *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 679 (fn.4) (6th Cir. 1979), it was recognized that a relevant labor market would exclude those under *twenty-five years of age* for the position of Detroit Police sergeant.

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. *Hazelwood School District, supra.* 433 U.S. at 299, n. 13.

The City's expert himself testified that it was essential to define the *relevant labor market* to determine racial disparity, if any, in the work force under consideration. *See Hazelwood, supra,* 433 U.S. at 308 and *Detroit Police Officers' Ass'n., supra,* 608 F.2d at 688, which recognize that the *metropolitan Detroit labor market* as the best basis for comparison, not general population figures for the City. This is not to indicate that more general population racial statistical data, which is not as accurate, does not have some relevance, even though its probative value may be slight.

Sound statistical data in this case was essential for this court to determine whether there "is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities." *Detroit Police Officers*, at p. 694, citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 324 (1978).

As in *Mayor v. Educational Equality League*, 415 U.S. 605, 621 (1974):

> "this is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded."

Persons who may adequately serve as police lieutenants have special qualifications that many in the general population simply do not have. I believe that there has been a failure to consider the best and available statistical data, and that there should have been an *en banc* consideration in this case.

Revision or elimination of Section IV-C of the original panel opinion in this case does not in any way solve the problem addressed in this dissent.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed March 29, 1983)

HANSON BRATTON, et al.,
Plaintiffs-Appellants,

vs.

CITY OF DETROIT, et al., No. 80-1837
Defendants-Appellees,

and

GUARDIANS OF MICHIGAN, et al.,
Intervening Defendants-Appellees.

Before: MERRITT and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

Clerk

Issued as Mandate:
June 21, 1983

COSTS: NONE

Filing fee . . . . . $
Printing . . . . . $
Total . . . . $

A TRUE Copy.

Attest:

/s/ LINDA L. BRINSON

Deputy Clerk

BAKER v. CITY OF DETROIT
Cite as 483 F.Supp. 930 (1979)

MEMORANDUM OPINION

KEITH, Circuit Judge, Sitting by Designation.

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INTRODUCTION

This case presents a host of issues regarding affirmative action and the broader question of race relations in the City of Detroit and throughout the United States. It brings into focus the tension which exists when the expectations of whites are affected by programs designed to aid minorities.

The controversy in this case can be simply summarized. In 1974, the City of Detroit commenced an affirmative action program regarding promotions in the Detroit Police Department. This program resulted in the preferential promotion of Black Officers. White officers considered themselves aggrieved by the program and brought this lawsuit. There exist three basic job levels[1] in the Detroit Police Department: patrolman, sergeant and lieutenant. The particular controversy in this case concerns the promotion of officers from the rank of sergeant to the rank of lieutenant.[2]

The ordinary procedure which the Detroit Police Department uses to make promotions can be simply summarized. The candidate takes a written examination and, upon attaining a minimum score of 70, the officer's name is placed on a promotion eligibility list. The officer's rank on such a list is determined by a number of factors, including exam score, length of service in Department, ratings by superior officers, and level of college education. Although the relative weights of

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[1] There do exist other ranks such as Commander and Chief of Police, but very few persons occupy them.

[2] A closely related lawsuit was decided in February of 1978 by another U.S. district judge of the Eastern District of Michigan, the late Fred W. Kaess. *DPOA* v *Young*, 446 F.Supp. 979 (E.D. Mich. 1978). That case concerned the affirmative action program regarding promotions from the rank of patrolman to the rank of sergeant. It is currently awaiting decision on appeal to the U.S. Court of Appeals for the Sixth Circuit.

these factors have been shifted over the years, the general procedure has remained that after each factor has been assessed, an overall rating is given to each officer desiring promotion. The candidates for promotion are then ranked numerically from 1 to 500 or however many officers there are on the list. Ordinarily, the officers (in this case sergeants) are promoted to the higher rank (in this case lieutenant) strictly in rank order, depending on how many openings are available. Thus, if the Department needed 12 lieutenants, it would promote the top 12 sergeants on the list.

The City's affirmative action program added a simple wrinkle to the ordinary promotion procedure — it ensured that equal numbers of black and white officers would be promoted. Thus, instead of promoting in order of rank on the eligibility list, the City promoted the top white officers and the top black officers in equal numbers as needed to fill the available openings at the lieutenant's level. The problem cited by plaintiffs is that almost all of the black officers ranked lower on the list. By promoting these lower-ranking black officers, the City effectively by-passed an equal number of white officers who ranked higher on the list and who would otherwise have been promoted. Thus, if the City needed 22 lieutenants, instead of taking the top 22 sergeants on the promotion list, it would take the top 11 white sergeants and the top 11 black sergeants. White sergeants with numbers 12-22 on the promotion list would be passed over for promotion, assuming that there were no black sergeants in this range.

The by-passed white sergeants were understandably upset. They had followed the procedures for promotion set out by the City and had ranked near the top of the promotions list. They considered it grossly unfair for the City to by-pass them. In addition, the black officers who were promoted ahead of the by-passed white officers had ranked lower on the list, and thus, in the minds of the white officers, were less qualified.

Feeling that they had been illegally discriminated against, the white sergeants brought this lawsuit. Although the legal issues are varied and complex, the plaintiffs' claim can be simply and accurately summarized — it should be illegal for the City to promote blacks over whites solely because of race, especially when the whites ranked higher on the list and were thus, presumably, better qualified.

Plaintiffs position has facial appeal. On the face of it, racial discrimination against whites should not be tolerated by the law any more than racial discrimination against blacks. Why should lower-ranking blacks get promotions over higher-ranking whites? The City's response to these concerns raised by plaintiffs also has much appeal: 1) The City has been guilty of extensive past discrimination against blacks; 2) black officers at all ranks are desperately needed in a predominantly black city because of the need for citizen-police cooperation and related reasons; and 3) the black officers promoted were as qualified as the white officers passed over by them because the ranking on the promotional list was essentially meaningless.

These are the issues presented in this lengthy litigation. They are not easy to resolve and there is no result which can satisfy both sides. The parties and the people of the City deserve a full explanation of this Court's views. Because of the significant and difficult nature of this case, this Court shall try to write as clear and concise an opinion as possible; understandable by lawyer and layman alike. The Court sets forth hereinbelow its findings of fact and conclusions of law, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. PROCEDURAL HISTORY

A. Statement of the Case

This consolidated action challenges the method of promotions of black male police officers from the rank of sergeant to the rank of lieutenant within the Detroit Police Department (Department) made pursuant to a voluntary affirmative action program which the governing body of the Department, the Board of Police Commissioners, promulgated in July, 1974. Named as defendants in this lawsuit are the City of Detroit; Coleman A. Young, Mayor of the City of Detroit; the Detroit Board of Police Commissioners and its individual members; and Philip G. Tannian, Chief of Police[3] (City defendants).

Case Number 5-71937 was commenced in this Court on October 7, 1975, by Kenneth A. Baker and six other individuals (the *Baker* plaintiffs). Each claims that he was denied promotion from the rank of sergeant to lieutenant off of the 1973 eligibility register solely on the basis of his race and sex,[4] in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title VII of the Civil Rights Act of 1964, as amended March 24, 1972, 42 U.S.C. § 2000e *et seq.* and § 706(f)(1) and (3), 42 U.S.C. §§ 1981, 1983, and 1985(3), the Constitution of the United States and the Constitution and laws of the State of Michigan, and the Charter of the City of Detroit.

Case Number 5-72264 was brought as a class action in Wayne County Circuit Court on November 3, 1975. The

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[3] The present Chief of Police, William L. Hart, replaced Mr. Tannian in September of 1976.

[4] The allegations concerning sex discrimination were later dropped.

named plaintiffs are Hanson Bratton, four other individual white male sergeants, and the Detroit Lieutenants and Sergeants Association (the *Bratton* plaintiffs), who challenged the same affirmative action program under attack by the *Baker* plaintiffs. However these claims are limited to promotions that were made off of the 1974 and subsequent eligibility registers.[5] Both sets of plaintiffs sought promotion, back pay, actual and punitive damages and an injunction against continued operation of the affirmative action program.

On motion of the City defendants, the *Bratton* action was removed to the United States District Court for the Eastern District of Michigan on November 26, 1975. While still in state court, the *Bratton* plaintiffs sought and obtained a temporary restraining order and an order to show cause why a preliminary injunction should not be issued enjoining the promotion of black male officers from the rank of sergeant to lieutenant pursuant to the affirmative action program. City defendants moved to dissolve the temporary restraining order issued by the state court. After a hearing, this court dissolved the temporary restraining order on November 26, 1975.

The *Baker* plaintiffs petitioned for a preliminary injunction restraining the Department from making promotions to the rank of lieutenant pursuant to the affirmative action program. The preliminary injunction motion was denied after a hearing by this Court on October 24, 1975.

---

[5] The Lieutenant and Sergeant's Association, (*Bratton* plaintiffs) did not oppose the first set of affirmative action promotions made on September 23, 1974, from the eligible register for the December 16, 1973, lieutenant's exam. According to former LSA president Joseph Clark, this was because the city agreed to allow an early pension payout in return. The individual group of officers known as the *Baker* plaintiffs did file suit against this first set of promotions however.

The *Bratton* plaintiffs moved for leave to amend their original complaint on February 7, 1977. This Court granted the motion by order dated March 9, 1977. The defendants filed their answer to the amended complaint and affirmative defenses on May 24, 1977.

On August 26, 1976, this Court certified the *Bratton* action as a class action pursuant to Rule 23(b)(2) of Federal Rules of Civil Procedure. On September 19, 1977, the Court amended its class action order and defined the class as:

> "All past, present and future qualified white male police sergeants who since November 1974 have been or will be denied because of their race to be timely promoted to the rank of lieutenant."

Plaintiffs moved on April 7, 1978, to recuse this Court. After referring the motion to the Magistrate and a hearing, this Court denied the motion by memorandum opinion and order dated June 29, 1978.

On May 18, 1978, the Guardians of Michigan, a voluntary association of black police officers, and seven named individuals, moved to intervene as parties defendant in these actions (Intervenors). By order dated July 6, 1978, the court granted intervention allowing the Guardians, et al., to proceed as party defendants.

By order dated May 4, 1978, this Court granted the City defendants' motion to consolidate the *Baker* and *Bratton* actions for remaining pre-trial matters and for trial. In June, 1968, the *Bratton* and *Baker* plaintiffs filed a joint motion for summary judgment on the issue of liability. After considering the recommendation of the Magistrate and hearing further oral arguments by the parties, this Court by order dated August 1, 1978, denied the motion.

In June, 1978, plaintiffs moved for trial by jury at the liability stage of the proceedings. After considering the

recommendations of the Magistrate, and the pleadings of the parties, the Court by opinion and order dated August 1, 1978, rejected plaintiffs' demand for a jury trial. Plaintiffs sought a writ of mandamus on the jury issue which the Court of Appeals for the Sixth Circuit denied.[6]

Prior to trial, plaintiffs moved to compel the City to respond to certain discovery requests. After hearing oral argument, the Court granted plaintiffs' motion and requested that the *Baker* plaintiffs submit an order embodying the ruling of the Court from the bench. Thereafter, the parties entered into an agreement outlining the further discovery obligations of the City defendants as well as those of the intervening defendants. By this stipulation the parties resolved all outstanding discovery matters and during the trial the Court was advised that all outstanding discovery requests had been satisfied.

By stipulation all parties agreed to bifurcate the trial proceedings into two stages, one to determine liability and another to assess damages.

On August 19, 1978, the City defendants filed a motion for partial summary judgment, seeking dismissal of all monetary claims other than back pay. This Court granted the motion by memorandum opinion and order dated September 25, 1979.

On August 22, 1978, this Court commenced trial of the liability phase of this litigation. The trial spanned five months, including 55 trial days, and was completed on January 18, 1979. Over 45 witnesses appeared at trial and the parties stipulated to the introduction of prior sworn testimony. The

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[6] Justice Thurgood Marshall of the U.S. Supreme Court denied plaintiff's request for a stay of proceedings pending Supreme Court consideration of the jury trial issue. It does not appear, however, that the plaintiffs ever petitioned the Court to review the Sixth Circuit's denial of a writ of mandamus.

total trial transcript was over 6300 pages. In addition, over 230 exhibits were introduced into evidence.

All parties were ordered to submit post-trial briefs simultaneously and all sides were afforded an opportunity to submit reply briefs. On April 30, 1979, the Court heard closing arguments.

B. Summary of the Legal Claims

Plaintiffs allege that the City's affirmative action plan discriminates against them because of their race (white) and that such discrimination violates both federal and state law. Plaintiffs claim that there should be no difference between discrimination against whites and discrimination against blacks, regardless of good intentions or the desire to remedy possible past discrimination.

Defendants deny that their actions violate any provisions of state or federal law, or of the constitutions of the State of Michigan or the United States, and contend that the law permits the Department's voluntary affirmative action efforts. They assert that the Department and its governing body, the Board of Police Commissioners (Board) had an affirmative duty, under state and federal guidelines and law, and the United States Constitution, to remedy the present effects of the Department's past employment discrimination, and to assure that the Department police the City of Detroit effectively and in a non-discriminatory fashion.

As noted in this Court's Opinion on the summary judgment issue,[7] after extensive public hearings and presentations of fact and law, the Board of Police Commissioners by resolution in July, 1974, found it necessary because of past and present

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[7] See Memorandum Opinion and Order granting defendants' motion for partial summary judgment, released September 25, 1979, 483 F.Supp 919.

discrimination in the hiring and promotion practices of the Department, and the operational needs of the Department, to institute an affirmative action promotional scheme. At intervals thereafter, the Board reviewed the continuing need for the program.

Defendants contend that the facts overwhelmingly support the defendants' determinations (1) that the Department had unlawfully discriminated against blacks in hiring and promotions; (2) that the Department's discrimination had damaging effects against not only black applicants and police officers but also against black residents of Detroit and on the Department's ability to police the City effectively; and (3) that the affirmative action promotional scheme was the only effective remedy to eradicate prior employment discrimination, to improve the Department's operational efficiency, and to repair police-citizen relations.

Plaintiffs argue that the City's defenses should be irrelevant as a matter of law and cannot justify the effect of the affirmative action program on them. Further, the plaintiffs argue that any past discrimination against black officers merely resulted from the use of facially neutral hiring criteria, such as I.Q. tests, which blacks failed much more than often than whites. Plaintiffs concede that use of such discriminatory tests which are not demonstrably job-related violates Title VII of the 1964 Civil Rights Act, as interpreted by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). However, Title VII did not apply to municipal employers such as the defendant until March of 1972. Plaintiffs thus contend that although past Department practices may have hurt blacks' chances for hiring or promotion, the Department did not violate the law in the past because it did not engage in past *intentional* discrimination which would amount to a Constitutional violation against black officers under *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Finally, plaintiffs argue that even if affirmative action is in order, they should not have to pay the price for it. That is, the City should at least be ordered to pay them back wages and other compensation they would otherwise have received. The case is now ready for decision. For the reasons which follow, this Court upholds the City's affirmative action plan as permissible under law.

II. THE HISTORY OF PAST DISCRIMINATION IN THE DETROIT POLICE DEPARTMENT

A. Hiring Practices

The Detroit Police Department's Affirmative Action Program does not exist in a vacuum, nor did it pop up overnight just because the City thought that it would be a good thing to do. As will be discussed below, the program arose principally because the City thought it necessary to offset years of discrimination. Put another way, the City reasoned that absent discrimination, many more black officers would have risen to the rank of lieutenant. At trial, the City introduced extensive evidence regarding past discrimination against blacks in the police department — in hiring, in the ranks, and in promotions. It is a sad and sorry record and it is largely undisputed.

1. 1943 — The First Detroit Race Riot

In June of 1943 a race riot erupted in Detroit. The riot unquestionably had many causes, e.g. tension between Southern workers who were working in Detroit factories during the war and the black community. While it cannot be said that the Detroit Police Department caused the riot, the Department's performance during the riot was disturbing. The Department was virtually all white and the few black members of the Department were strictly segregated. The Department had over three thousand officers. Yet, there were only 43 black

officers in the Department and, as will be discussed below, they were treated as second-class officers. During the riot both black and white citizens were openly engaged in unlawful, riotous conduct, yet enforcement of the law was not equal.

A comprehensive report describing and analyzing the riot was prepared in 1943 by Walter White and Thurgood Marshall of the National Association of the Advancement of Colored People (NAACP). Mr. Marshall, now a Justice on the United States Supreme Court, described past discriminatory police practices in Detroit and went on to discuss the Department's role in the riot:

> "In the June riots of this year, the Detroit police ran true to form. The trouble reached riot proportions because the police of Detroit once again enforced the law under an unequal hand. They used "persuasion" rather than firm action with white rioters while against Negroes they used the ultimate in force; night sticks, revolvers, riot guns, submachine guns, and deer guns. As a result, 25 of the 34 persons killed were Negroes. Of the 25 Negroes killed, 17 were killed by police. The excuses of the Police Department of the disproportionate number of Negroes killed is that the majority of them were killed while committing felonies; namely, the looting of stores on Hastings Street. On the other hand, the crimes of arson and felonious assault are also felonies. It is true that some Negroes were looting stores on Hastings Street and were shot while committing these crimes. It is equally true that white persons were turning over and burning automobiles on Woodward Avenue. This is Arson. Others were beating Negroes with iron pipes, clubs, and rocks. This is felonious assault. Several Negroes were stabbed. This is assault with intent to murder.
>
> All of these crimes are matters of record; many were committed in the presence of police officers, several on the

pavement around the City Hall. Yet, the record remains, Negroes killed by police — 17; white persons killed by police — none. Eighty-five percent of persons arrested were Negroes.

Evidence of tension in Detroit has been apparent for months. The Detroit Free Press sent a reporter to the police department. When Commissioner Witherspoon was asked how he was handling the situation, he told the reporter: 'We have given orders to handle it with kid gloves. The policemen have taken insults to keep trouble from breaking out. I doubt if you or I could have put up with it.' This weak-kneed policy of the police commissioner coupled with the anti-Negro attitude of many members of the force helped to make a riot inevitable."

Thurgood Marshall, "Activities of Police During the Riots June 21 and 22, 1943" in White & Marshall, *What Caused the Detroit Riot? An Analysis 29-30* (NAACP 1943) (Exhibit 217). *See also* R. Shogan & T. Craig, *The Detroit Race Riot, A Study in Violence* (1964).

In this same report, Mr. White complained of the "inadequate number" of black officers and specifically recommended "that the number of Negro officers be increased from 43 to 350 [and] that there be immediate promotions of Negro officers in uniform to positions of responsibility." White & Marshall, *supra* at 17. The City did not follow this recommendation.

2. Employment Practices 1944-53

Between 1944 and 1953, 3005 whites and 17 blacks (3.7%) were appointed to the Department. By way of illustration, annual black hires ranged from 4 to 28 during those years, while annual white hires ranged from 135 to 560. These hiring figures resulted in a virtually all-white Department. The Task Force on the Police Report of the President's Commission on Law Enforcement and Administration of Justice (1967) gave

the stark figures for 1953: 3,565 white patrolmen, 96 black patrolmen. The supervisory ranks were virtually barren of blacks: there were 3 black sergeants out of 347 and one black lieutenant out of 168. Overall, the department was less than 2.5% black. In contrast, the City, according to the 1950 census, was 16% non-white. Even including the metropolitan area, the non-white population was 12%.

The few blacks who were hired were strictly segregated. Most blacks were on the "patrol side" as opposed to the "investigative side." That is, most were uniform officers assigned to various precincts as opposed to being non-uniform officers assigned to various investigative bureaus.[8] Within the precinct, blacks were permitted to patrol clearly defined areas only. Scout cars were similarly segregated. Black officers were relegated to a few designated scout cars which were for blacks only. Black officers had to walk a beat for many years until a vacancy opened up in one of the black cars. Junior white officers had an easier time obtaining scout car assignments since there were far greater numbers of white-only scout cars. The only time that whites and blacks rode together in scout cars, even on temporary assignments, was when the white officer consented. In addition, white officers were occasionally assigned to ride with blacks as a form of punishment. Assignments in the station house were generally regarded as desirable. However, blacks were relegated to menial jobs which involved little contact with the general public — jobs such as locking up prisoners and performing janitorial functions.

Similar segregation took place on the "investigative side." Black investigators were teamed only with blacks and worked

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[8] These divisions have historically existed within the Department. The "police side" and the "investigation side" were distinct and had distinct lines of command.

almost exclusively in black areas. When they worked in a white part of town, their function was only to arrest blacks. Some investigative bureaus such as Robbery and Auto were off-limits to blacks altogether.

As indicated, above, there were only a handful of black sergeants and lieutenants. However, they were not deemed good enough to supervise whites. They were, accordingly, permitted only to oversee black patrolmen. In contrast, white officers of inferior rank would occasionally supervise superior officers who were black.

The pernicious effect of this segregation on blacks is vividly shown by "integration" of police raids on illegal late-night gambling and drinking establishments known as "blind pigs." Where these establishments were black-operated, it was impossible for white undercover officers to gain admittance to them to observe the illegal activity, make buys, and preserve evidence until other officers completed the raid. Out of necessity, black officers were used for this purpose. However, present Police Chief William L. Hart's testimony showed vividly how black officers were used only to the extent necessary. Their role in the raid ended after entry by the raiding white officers. The white officers refused to eat with the black officers and often excluded them from the normal processing of contraband. After the raid, the black officers were returned to their segregated beats. The effect of such stigmatization on black officers can only be surmised, but it was doubtless considerable.

Equally important was the pernicious effect of segregation upon the public safety. So deeply ingrained was prejudice against black officers that if a black officer assigned to a patrol car was out sick, only blacks could be used as fill-ins. If no black officer was available to fill-in, the car would not go out that day. Similarly, if a "black" patrol car was out of service, the black officers who used it would be assigned to go on foot

patrol. This was so even if a "white" patrol car was lying idle. In both cases, the public was deprived of the benefit of a scout car patrol. Police dispatchers were instructed never to send black cruisers into white neighborhoods. If there was a situation of great danger — a so-called "hot run," — the nearest patrol car would normally be immediately ordered to the scene. However, if the disturbance requiring immediate attention took place in a white neighborhood, the "no blacks allowed" rule took precedence, even if a white cruiser was more distant.

3. Employment Practices 1954-60

Things remained much the way they are described above throughout the 1950's. Between 1954 and 1960 the Department hired 1210 whites and 51 blacks. In December of 1960, the U.S. Commission on Civil Rights held hearings in Detroit. Mr. Arthur L. Johnson, then Executive Secretary of the Detroit Branch of the NAACP, presented forceful testimony regarding deliberate police brutality against the black community. Mr. G. Nelson Smith, Community Services Assistant, Detroit Urban League presented specific testimony regarding discrimination against blacks within the Department. Former black officers in the Department corroborated this testimony. The above testimony contrasted sharply with that the Chief of Police (then called Police Commissioner) Henry Hart who painted a rosy picture of the Police Department and its practices.

The data presented by the Chief of Police at the 1960 hearings regarding black employment was as follows: 134 out of the 4357 officers on the force were black — slightly over 3%. There were six black sergeants and no black lieutenants. In contrast to these figures, the Wayne County Sheriff's Department was nearly 30% black. This difference was unexplained, and is difficult to justify, especially given that recruits for both

the Detroit Police Department and the Wayne County Sheriff's Department receive similar training.

As of December 1958, a Detroit Urban League survey of the Department (summarized in the hearings) showed that little had changed since the 1943 Riot. The Department was 3% black, black officers were segregated in scout cars, in beats and in partner assignments. Of the 13 precincts, 5 had no blacks assigned to them while 85% of all black officers were assigned to 5 other precincts.[9]

By the time of the Civil Rights Commission Hearings in 1960, however, the Department was slowly beginning to desegregate. The first steps were taken in March, 1959 when the Department initiated a program to desegregate scout cars. This program was strongly opposed by white officers. In protest, the officers staged a so-called "blue flue" protest action by going on a ticket strike. The day after the squad car integration policy was announced, the writing of traffic summonses dropped to 10% of the number normally issued. Given the opposition by white officers, desegregation proceeded slowly. By December 1960, Chief of Police Hart was able to testify before the Commission that 24 of the Department's 118 scout car crews were integrated. In addition, some integration of precincts had been achieved.

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[9] It is true that then Chief of Police Herbert Hart testified before the Civil Rights Commission in 1960 that 30 out of 134 black patrolmen (over 25%) were assigned to desirable bureau assignments as opposed to only 5% for whites. An examination of the breakdown provided by the Chief reveals that no blacks were assigned to such major bureaus as Robbery, Auto, and Breaking and Entering. And, Deputy Chief Bannon pointed out that blacks who served in the Bureaus were given lowly assignments which generated low service ratings.

4. Employment Practices 1960-67

The desegregation of the Department continued in the 1960's, but at a snail's pace. Discriminatory scout car assignments continued to be made; in some precincts scout cars remained segregated until the mid-1960's. Integration of investigative bureaus and units was not achieved until the mid-1960's. Similarly, it was the mid-1960's before blacks on the patrol side were first allowed to supervise whites, even whites of inferior ranks.[10] George Edwards, now Chief Judge of the United States Court of Appeals for the Sixth Circuit, stepped down from the Michigan Supreme Court to become Detroit Police Commissioner in 1962. As Commissioner in 1962 and 1963, Judge Edwards tried to implement changes. He issued orders to fully integrate the Department. Subsequent Commissioners tried to do the same thing, with "less than spectacular success"[11]

The principal obstacle throughout these efforts was the stubborn resistance of white police officers. As late as 1969 massive resistance to integration was still taking place. The testimony of Deputy Chief James Bannon was particularly vivid: In 1969 he was made commanding officer of the Narcotics Bureau. He found that he needed black officers to help investiage the growing abuse of drugs in the black community. He asked for and received permission to transfer into the Narcotics Division six black officers. Upon their arrival, the black officers met with severe hositility and a campaign of harassment. In addition, they were subjected to great danger because information about their assignments was leaked to people in the drug underworld. Not wishing to be "martyrs," the men requested transfer out of the division. Bannon persuaded them to stay on, but was unable to fully resolve the

[10] On the investigative side, blacks were supervising whites a bit earlier, in the early 1960s.

[11] Testimony of Deputy Chief James Bannon, at 5091.

conflict until he restructured the Narcotics Bureau and facilitated some transfers and retirements.

Just as there was some progress in desegregating the Department in the 1960's, so there was some progress in hiring more black officers. Between 1961 and 1966, the Department hired 1,080 white and 86 black (7.4%) police officers. In 1967, an additional 252 white and 71 black (22%) police officers were hired. Progress was slow, however. The Department was no more than 6% black in 1967. The number of blacks holding command ranks was truly miniscule. In 1967, there were 339 white and nine (9) black sergeants (2.5%), 156 white and two (2) black lieutenants (1.3%) and 62 whites and (1) one black above the rank of lieutenant.

5. The Department's Relations with the Black Community

This Court has previously noted the harsh, stigmatizing segregation which the Department imposed upon black police officers up to the mid-1960's. It is not surprising that this same department would treat members of the black community with contempt similar to or worse than that displayed toward its own black officers. Then NAACP General Counsel Thurgood Marshall in an excerpt quoted earlier in this opinion, *supra*, commented on unequal police practices during the 1943 riot. The evidence reveals that since at least that time, the relationship between the Department and the black community was one of mutual hatred and suspicion.

The testimony of Arthur L. Johnson of the NAACP before the Civil Rights Commission in 1960 summed up the situation quite well:

> Relations between the Negro community and the police in Detroit are not good. They are characterized by persistent conflict and tension. Negroes do not generally regard the police as being friendly and respectful. They see the

police as being antagonistic and often willing instrumentalities in the racial segregation aims of the dominant white community.

The attitude of police toward Negroes in Detroit was demonstrated in the sensational police-ticketing strike in March 1959. This act of rebellion was brought on as a part of police opposition to limited, initial plans of integrating scout cars in Detroit. The demonstrations were so widespread that for a brief period a virtual crisis was created in the police department.

Employment discrimination, which figured in the ticketing strike, reflects basic attitudes and adminstration policy in the police department. The weak position of Negro personnel in the department is ringing proof of the scope and gravity of this practice.

At absolutely no point in their experience do Negroes in Detroit see the law enforcement agency as being truly color blind. . .

If a basic police policy does not exist supporting containment, intimidation and general mistreatment of Negroes, there exist, with the same effect, very strong anti-Negro, anti-integration, and anti-civil rights practices and attitudes which dominate the Detroit Police Department's image in the Negro community.

It can be said, quite possibly without contradiction, that no responsible Negro citizen in Detroit would have difficulty relating at least one personal encounter or observation which would support the basic charges being made here.

Underlying the eruption of police brutality and the tensions between police and the Negro community are several specific and related offenses. Negroes complain of illegal and unreasonable arrests, of indiscriminate and open searching of their person on the public streets, of disrespectful and

profane language, of derogatory references to their race and color, of interference with personal interracial associations, and of violent, intimidating police reactions to their protests against improper treatment. Negroes in all classes make these complaints, for the offenses are directed against Negroes as a group.

The police brutality problem is a direct result of the anti-Negro attitudes and practices and their related conflicts and tensions which permeate relations between the police and the Negro community.

Willis Ward, an assistant U.S. Attorney in Detroit, who is now a probate judge in Detroit, shared Mr. Johnson's concerns. He and concerned white citizens got together with the leaders of the black community and rapidly reached the conclusion that things were not right. He repeated these conclusions in testimony before the Civil Rights Commission:

1) The police department seems to be working under a program of containment of the Negro citizen by brute force, and the discouragement of lawful and moral communications and commingling of the white and colored citizens by hazing such groups; 2) the police department considers the Negro citizen as a second class in status; 3) only a representative and token number of Negroes should be taken into the police department; and 4) the Negro police officer is tolerated by his fellow officers, but not accepted as an officer of the law.

Mr. Ward spoke those words in 1960. Yet relations between the black community and the Police Department remained poor for many years thereafter. Testimony at trial revealed that there was basis for the black community's charges of police abuse. A number of black officers, for instance, testified at trial about various incidents where they observed police misconduct and abuse towards blacks. Each indicated that the

abusive practice in question was racially motivated and that they did not report the incident at the time for fear of reprisal by white officers.

One black officer violated the code of silence and paid the price. He observed a white officer brutally beating a black youth in a garage at the second precinct in September of 1965. Pursuant to the code, he covered up the incident in an initial report. Upon being pressed by the Citizens Complaint Bureau, however, the officer gave a truthful and detailed account of what had happened. Word that he had "squealed" leaked out. Retribution from white officers was swift. He was verbally abused and his car was vandalized. In addition, he alone among the officers involved was disciplined by the department for submitting the (initially) false report about the incident. The controversy was finally settled by the Michigan Civil Rights Commission, which found a violation of the officer's civil rights: "The individual acts of violation and harassment by persons believed by [the complainant] to have been fellow officers. . . appear to be clear and obvious acts of racial antagonism, stemming from his violation of the 'Blue Curtain' practice."[12]

6. The 1967 Riot

Antagonism between the Police Department and the black community was a root cause of the Detroit riot in 1967. The 1968 Report of the National Advisory Commission on Civil Disorders noted the "long history of conflict between the police department and citizens" in Detroit. Commission surveys found that police practices were a significant grievance in all riot-torn cities. The Commission approvingly cited a survey by the Detroit Urban League which found that

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[12] The author of this opinion was Julian Abele Cook, Jr., now a Federal District Judge.

police brutality headed the list of grievances which the black respondents though had led to the riot.

The Commission's overall conclusion that "deep hostility between police and ghetto communities [was] a primary cause of the disorders" is certainly correct regarding Detroit. This court has previously commented on police practices and the 1943 riot. In 1961 Judge Edwards, then a Justice of the Michigan Supreme Court, considered Detroit as "the leading candidate in the United States for a race riot."[13] In 1965, in a prophetic article in the *Michigan Law Review*, Judge Edwards noted the continued problem of police-black community relations, which he regarded as "the major problem in law enforcement in this decade" and as "the major cause of all recent race riots."[14]

In the summer of 1966 there occurred a relatively minor disorder in the black community called the "Kercheval Incident." A crowd gathered at the scene of a police stop. Tempers flared and a white officer struck a black citizen in the eye, detaching it from its socket. Rocks and bricks began to fly. Supporting police units were summoned and the scene soon returned to normal. This incident, however, was the harbinger of things to come.

The July 1967 Detroit riot was, unsurprisingly, triggered by an encounter between black citizens and the police. The 1968 National Advisory Commission on Civil Disorders outlined what happened. The police raided a "blind pig" in a black neighborhood in which a celebration was being held to welcome home black servicemen returning from Vietnam.

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[13] Report of the National Advisory Commission on Civil Disorders 85 (Bantam Ed. 1968).

[14] *See* Edwards, *Order and Civil Liberties: A Complex Role for the Police.* 64 Mich.L.Rev. 54-55 (1965).

There were many more persons at the "blind pig" than the police had expected, and an hour went by before everyone arrested could be moved to the police station. In the meanwhile, a larger crowd gatered which got too big for the police to handle. The crowd went on a rampage. For five days thereafter, Detroit experienced major racial violence. Forty-three persons died, 7200 persons were arrested, 683 structures were destroyed by fire. The police proved inadequate to deal with the violence and the city was occupied by 5000 Michigan National Guardsmen and 2700 regular army paratroopers. The horror and intensity of the violence is fully described in the "Riot" Commission's report;[15] there is no need to repeat the details here.

7. The Detroit Police Department 1967-68

A shaken city slowly recuperated from the riot. At the time of the riot, the city was almost 40% black. The Police Department was no more than 6% black and its command structure was virtually all white. The City was hard hit by the realization that a police department whose racial composition was so grossly disproportionate to the population it served was undesirable and unacceptable to the black community. Executive Deputy Chief of Police Bannon, who had been in the Department since 1949, testified at trial that the riot convinced people in and out of the Department, many for the first time, that the Police Department could not do its job effectively with so few black officers. Detroit's Mayor at the time, Jerome P. Cavanaugh, reached the same conclusion: "It became obvious to me and this entire community, both black and white, that this proportion of Negro policemen (6%) was

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[15] *See* Report of the National Advisory Commission on Civil Disorders 84-108 (Bantam Ed. 1968).

clearly unacceptable."[16] The need for more black officers at all levels of police departments in general was a key finding of both the National Advisory Commission on Civil Disorders[17] and the 1967 President's Crime Commission Report.[18]

Why was the Police Department so overwhelmingly white? A key reason is that the hiring process had been riddled with discrimination for years. The application and hiring process for a job as police officer in 1968 consisted of five stages. (The stages in the process have remained basically the same since then and were basically the same before then). An applicant first filled out a preliminary application card and was screened as to the Department's nine preliminary qualifications, such as height and weight limits, education, and vision requirements. The second step was a written examination. If the candidate passed he or she was scheduled for a physical examination. Following successful completion of the physical examination, a background investigation was initiated. The final step was for the candidate to appear before three members of the Department for an interview. This Oral Board makes the final decision whether the applicant would be offered employment as a police officer.

Discrimination in the hiring process existed at all levels. First, the Department used a written exam of several hours duration which black failed at a much higher rate than whites. In 1967, for example the black failure rate was twice the white failure rate. The reason for the disparity in passing rates for

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[16] Special Task Force Report on Recruiting and Hiring 3 (1968) (exhibit 8).

[17] *See* Report of the National Advisory Commission on Civil Disorders 315-18 (Bantam Ed. 1968).

[18] *See* The President's Comm. on Law Enforcement and Administration of Justice: *Task Force Report: The Police* 167-175 (1967) (hereinafter cited as *Task Force Report*).

black and white officers is that the exam was an I.Q. test which was not job-related. In other words, it did not measure whether a candidate would make a good police officer. It did, however, disqualify large numbers of black applicants. The Department was well aware of this fact but continued to use this test for years.[19] Second, the hring system facilitated subjective decisionmaking which, in practice, operated to the detriment of black applicants. This was true in two respects: oral boards used to question and screen applicants, and background investigations of applicants.[20] Third, blacks were disproportionately affected by preliminary screening. Preliminary screening took place when an applicant for employment first "came through the door." If the applicant did not meet certain strict requirements, — age, education, height, weight, vision and marital status, then he would be turned down immediately. However, an investigation by the Commission on Community Relations in Detroit found that in 1959, 178 whites but only 36 blacks were permitted to progress past preliminary screening even though they failed one or more preliminary screening requirements. The Commission found that white applicants were favored.[21]

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[19] *See Task Force Report, supra* at 169. Other changes were made in the entry exam in years following. They will be discussed below.

[20] *See Task Force Report, supra* at 169. Background investigators were mostly white. For example, in 1968 eight out of ten investigators were white.

[21] The subjective, haphazard hiring system's anti-black effects are also illustrated by the Cadet Training Program. This program was for young men 18-20 who aspired to become police officers at 21. Those who served as cadets received preferential treatment in hiring. While in theory anyone could apply, the program was not advertised and most of the cadets learned of the program through word-of-mouth referral. The result was that large numbers of cadets were sons of police officers and ninety percent of the cadets were white. This program was phased out in the early 1970's.

One other factor bears examination at this point — the effect of the Police Department's reputation. The testimony in this case overwhelmingly shows that the Police Department had a horrible reputation in the black community in 1967-68 and for years before that. The evidence shows that this reputation, built on years of abuse and hostility, operated to deter blacks from applying to the Police Department for employment. At the same time, the statistical evidence tended to show that blacks applied to the Police Department in numbers more than reflecting their share of the population. The Commission on Community Relations found this to be true in 1959.[22] The Detroit Special Task Force Report on Recruiting and Hiring found that in 1967, 47% of the applicants to the Department were black while only 40% of the city's population at the time was black. Thus, despite discrimination and abuse, blacks applied to the Department in large numbers. This appears to be contradictory. An answer to this paradox is that employment with the Police Department has historically been a way in which the poor have climbed out of poverty. Blacks were foreclosed from many jobs; many of them apparently decided to apply to the Police Department despite its reputation and despite inferior working conditions for blacks within the Department. Absent discrimination, however, it is logical that many more blacks would have applied.

8. 1967-1974 Employment Practices of the Detroit Police Department

(a) 1967-1971 Employment Practices

The City did take some steps to increase the unconscionably small number of black officers. In 1968, Mayor Cavanaugh appointed a Special Task Force on Recruiting and Hiring to review Departmental practices and recommend changes in them. The Mayor's Special Task Force recognized the problems with minority recruitment and hiring and

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[22] *See Task Force Report, supra* at 169.

recommended a number of changes. Recommendations to improve the Department's recruitment of minorities also came from a committee of industrial psychologists known as the Vickery Committee.

A number of these Commissions' recommendations were adopted. Department standards regarding rejection for Traffic Records, Police Records, Marital Status and Credit were liberalized. Age, education, height and vision standards were loosened. Some efforts were made to increase the number of black officers involved in the recuitment and hiring process. The most important change which was made, however, was in the written exam. As indicated above, the Department prior to 1968 used multi-hour I.Q. tests which were widely known to be non-job-related and which blacks failed far more often than whites. In 1968, on recommendation of the above Commissions, the Department replaced this exam with a 12-minute Wonderlic exam which purported to measure problem-solving ability.

The parties have entered into a significant dispute regarding the Department's 1967/68-1974 minority recruitment efforts. The plaintiffs argue that beginning in 1969, the Department instituted aggressive efforts to recruit and hire large numbers of black officers. They argue from this that any pre-1968 discrimination was fully remedied and there was thus no need for the institution of the City's affirmative action program in July of 1974.

The plaintiffs overstate both the extent and the effect of the City's minority hiring efforts from 1968-1974. The plaintiffs rely heavily on the Detroit Police Department Equal Employment Opportunity Program Report (EEOP), written in November of 1975, which paints a glowing picture of the Department's efforts to recruit and hire minority officers. The EEOP Report, however, does not refer to the dates when changes in hiring practices took place. Careful examination of the facts

reveals that very few changes were made between 1968 and 1971 and that changes begun in 1971 did not begin to show results until 1973-1974. This was the testimony both of Thomas G. Ferrebee who was made Commander of the Recruiting Division in 1971, and Lieutenant Clarence Broadnax, who was assigned to the Division in 1968 as a police officer and has worked there ever since.

The testimony of Commander Ferrebee and Lieutenant Broadmax shows that in 1971 things were much as they always had been at the Detroit Police Department. White applicants were favored in many preliminary screening requirements. It was common for Recruiting Division administrators to approve white applicants who did not meet arrest and military qualifications as well as other preliminary qualifications. This seldom occurred in the case of black applicants, for there were no blacks in the command structure to whom a black applicant could turn to overrule a Recruiting Division rejection. Access to the preliminary application card file was unrestricted and cards were altered, or removed and not returned. Background investigators continued to act without any accountability and delivered subjective opinions which operated to the detriment of black applicants. The Oral Boards made similar subjective anti-black judgments. Even the medical exams operated to exclude blacks. A 1971 Report of the Michigan Civil Rights Commission found that Department physicians and psychiatrists frequently rejected black applicants on the basis of information which was disclosed not through the medical examinations which they conducted, but in background investigations. Again, the problem was the same — the impact of uncontrolled discretionary decision-making by whites, in this case, white physicians.

Perhaps the most discriminatory part of the hiring process was the written examination. As indicated above, until 1968, the Department used a 2½-3 hour I.Q. test, the Otis test,

which discriminated heavily against minorities. As an interim measure, the Department substituted a 12-minute Wonderlic test in 1968, on recommendation of the Vickery Commission. The Vickery Commission realized, however, that the Wonderlic test also discriminated against blacks. The Commission hoped that the test would be less discriminatory than the Otis test it replaced and reasoned that at least the ordeal for applicants and persons correcting the test would be less. However, as Commander Richard Caretti, presently Deputy Director of Personnel and assigned to the personnel division since 1968 testified, the Wonderlic, like the Otis, screened out minorities at "a dramatically disparate rate." The following table shows the discriminatory effect of the written exam:

Passed	1967	1968	1969	1970	1971
Blacks	247	394	287	335	580
Whites	566	817	808	1060	1244
Failed					
Blacks	244	530	511	514	522
Whites	117	255	226	244	233
Percent Failed					
Blacks	49.6%	57.4%	64.0%	60.5%	47.4%
Whites	17.1%	23.8%	21.9%	18.7%	15.8%

Additional evidence which demonstrates the Department's continuing discrimination against blacks from 1968-1971 is a Staff Report by the Michigan Civil Rights Commission. The Commission staff reviewed applications for patrolman from January 1, 1969, through March 31, 1970, and concluded that there was probable cause to believe that the Department "followed and continues to follow a course of action in its personnel practices leading to the unwarranted and disproportionate exclusion of large numbers of non-white persons from its employ." Exh. 234A at 21. The Commission staff's specific findings of discriminatory practices parallel the testimony of Commander Ferrebee and Lieutenant Broadnax

and are in accord with this court's findings. They are reproduced in the margin for the convenience of the reader.[23]

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[23] The claimants, black males, allege denial of employment opportunity [by the respondent Detroit Poice Department] because of their race.

Review of records relative to persons applying for employment with respondent in the period January 1, 1969 through March 31, 1970 discloses probable cause:

(1) to credit the claimant's allegations

(2) to believe that respondent has followed and continues to follow a course of action in its personnel practices leading to unwarranted and disproportionate exclusion of large numbers of non-white persons from its employ.

Practices so identifiable are as follows:

(A) Employment of a pre-employment criterion (draft classification, other than 1-Y) which eliminates disproportionate numbers of black applicants and for the job-relatedness of which respondent has no evidence.

(B) Apparent discriminatory application of that criterion to the benefit of white applicants.

(C) Employment of a pre-employment criterion (arrest and/or traffic record) which eliminates disproportionate numbers of black applicants and for the job-relatedness of which respondent has no evidence. (Cf. Section III-C, Statements #2(b), 16, 17, 18, 19, 20).

(D) Employment of a pre-employment test which eliminates disproportionate numbers of black applicants and for the job-relatedness of which respondent has no evidence.

(E) Employment of a pre-employment criterion (non-hypertensiveness) which eliminated disproportionate numbers of black applicants (Cf.: Section III-C, Statements, #5,9) and for the job-relatedness of which evidence is in dispute.

(F) Employment of a pre-employment test (allegedly a "psychological questionnaire") which results in the elimination of disproportionate numbers of black applicants and for the job-relatedness of which respondent has no evidence.

(footnotes continued on next page)

(b) 1971-1974 Employment Practices

Starting in 1971, with the appointment of Commander Ferrebee to head the recruiting division, matters did improve. Commander Ferrebee increased the number of black personnel in the Recruiting Division[24] and engaged in priority recruitment efforts to encourage qualified blacks to apply for a position as police officer. The Mayor's 1968 Special Task Force had recognized the need for special recruitment efforts

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(G) Employment of a pre-employment criterion (favorable U.S. military record) which eliminates disproportionate numbers of black applicants and for the job-relatedness of which respondent has no evidence.

(H) Apparent discriminatory application of that criterion to the benefit of white applicants.

(I) Employment of a condition of continuing (non-hypertensiveness) which eliminates disproportionate numbers of black employees and for job-relatedness of which evidence is in dispute. (Cf.: Section III-C, Statement # 10).

(J) Apparent discriminatory application of that criterion to the benefit of white employees.

(K) Employment of a hiring procedure which allows respondent's employees to use wide personal discretion in the treatment accorded applicants.

(L) Employment of separate job classification, subject to substantially different requirements and conditions, for males and females; and for the maintenance of which respondent has no bona-fide job-related reason.

(M) Employment of a work force composed of approximately 11% black employees within a municipal corporation; the black population of which is approximately 44% with subsequent substantial impact on the rights of that population to equal law enforcement.

[24] In 1971, all 5 Recruiting Division supervisors and 13 out of 19 investigators were white.

directed to the black community because of the Department's abysmal reputation with blacks. However, from 1968 until 1971, according to Sgt. Broadnax, the Department's minority recruiting program consisted essentially of one black lieutenant who acted as public relations man. The record demonstrates that the department did make some efforts in those years, but that they were neither extensive nor successful. Starting in 1971, the Department did begin to aggressively recruit minorities, however. Department applications data shows the effects of recruiting and how massive minority application did not take place until 1974.[25]

Under Commander Ferrebee's direction, the Department sought minority applicants throughout the state, especially those at Colleges and Universities. The Department conducted what the EEOP Report (exh. 26a) termed "perhaps the most extensive advertising campaign designed to attract minorities that has been carried on anywhere in the country."

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[25]

Year	White Applicants	Black Applicants
1968.....	3,022	3,069
1969.....	2,336	2,086
1970.....	3,236	2,516
1971.....	4,482	3,625
1972.....	2,935	3,314
1973.....	3,001	3,535
1974.....	36%	64%
1975.....	1,261	5,314
1976.....	23%	77%
1977.....	35%	65%

Plaintiffs have attached the validity of the Department's applicant flow data contained in exhibit 12(b) from which the above table is derived. See discussion at n. 59, *infra*. However, they approvingly cited the above table in their brief.

The techniques employed are described in the EEOP, excerpts are reproduced in the margin.[26]

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[26] "The Department utilizes two Dodge vans that are contributed annually by the Chrysler Corporation for the purposes of recruiting individuals. These vans are taken into populated areas and applications are accepted from interested men and women. Besides being used in the downtown areas, the vans are often used to recruit at factories, state employment offices and other places where qualified candidates are likely to be found.

The Department has initiated several new themes in minority recruitment. The "Being a Cop is More than Just a Gig", campaign was professionally designed program implemented by advertising consultants.

This long term project was aimed at convincing black men and women that the police service provides an excellent opportunity to make meaningful contributions to the community. Approximately $80,000 was expended on this campaign during a two-year period. An extensive recruiting campaign has also been conducted through local mass media. The Department has advertised in daily papers as well as on radio and television programs. Particular emphasis has been directed toward minority newspapers. During 1971 through 1973, a weekly radio program on WJLB, a local station with a large black audience, was begun where radio listeners were able to call in and ask questions of department officials. Many prospective applicants took advantage of the program to have questions answered regarding recruitment procedures. Radio advertising campaigns specifically aimed at black audiences were also launched on other black radio stations. Department officials have also appeared on numerous television programs to explain recruitment procedures at every available opportunity.

The Department utilized advertising in the community in other ways in addition to those mentioned above. Recruiting posters depicting minority officers are displayed prominently in the Recruiting and Department offices. Many owners of business places have allowed the Department to place posters aimed at minority recruitment in storefronts. (Significantly, these posters show the officer in "helping" rather than "enforcement" situations). We have also had an extensive bumper sticker campaign that helped get the "more than just a gig" message out

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Commander Ferrebee also instituted efforts to minimize the adverse impact of the hiring process on blacks. Access to the preliminary application card file was restricted to Department personnel who preliminarily interviewed applicants. No longer could anyone remove cards from the files without signing for them. In addition, written guidelines were issued to Department interviewers regarding the preliminary interview procedures.

Improvements were also made in Background Investigation procedures. Investigators were forbidden to accept the withdrawal of any candidate without approval from a supervisor. In 1972, each investigator began to receive equal numbers of black and white candidates to investigate. To further increase accountability, in 1974 investigators began to work in teams. In 1974, the EEOP Report showed that rates of disqualification on the basis of background investigations for minorities and whites were about equal.

Similar improvements were made in the Oral Board procedure. In 1973, the Department arranged that all applicants be asked similar questions by Oral Boards. Every Oral Board

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to the public. One of our most recent attempts in this area has been the advertising on benches used by the public in bus stops. Many of these benches are painted with the slogan, "Detroit Needs More Good Cops." Public busses are also used as an advertising medium.

The Department has recognized the fact that in some departments, reliance upon word-of-mouth recruitment has helped to perpetuate employment systems which have excluded minorities. To prevent this occurrence in Detroit, a referral program has been primarily directed toward minority officers who may be more aware of qualified minority persons in the community interested in a police career. Currently, one officer is assigned to coordinate referrals and the success of bringing in black applicants has been noteworthy."

came to contain at least one minority member.[27] In addition, an appeal process was set up. To further protect against abuse, the Department instituted a followup procedure to find out why black applicants who withdrew early from the hiring process did so and to encourage them to return.

The written examination, however, continued to be problematic. In 1971, the Department used the Wonderlic exam in combination with the Otis and also introduced the SRA Pictorial Reasoning Test. From 1971 until late 1973, the Department went to another series of I.Q. Tests identified as valid for Chicago patrolmen. This so-called "Chicago Battery" also had a severe impact on black applicants, as demonstrated by the following statistics for 1972-1973.

	1972	1973
Passed		
Blacks	544	390
Whites.....	1,027	826
Failed		
Blacks	493	302
Whites.....	179	205
Percent Failed		
Blacks	47.5%	43.6%
Whites.....	15.0%	19.9%

It was not until late 1973, with the institution of the "Detroit Battery" written examination, that pass rates on the written exam were equal for blacks and whites.

Plaintiffs argue that the Department's energetic 1968-1974 efforts to attract blacks and to make the Department's hiring

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[27] The record is unclear on when this took place. Although defendants state that it was in 1974, plaintiffs properly point out in their reply brief that the date is not given in the Department Report which noted that this change had been made.

procedures non-discriminatory demonstrates that no affirmative action program was needed for promotions. This claim will be analyzed later in this opinion. However, it is very clear that Commander Ferrebee and Lieutenant Broadnax were correct when they concluded that it was not until 1973-1974 that the Detroit Police Department stopped its discriminatory hiring practices.

B. Promotional Practices

The Department's promotional practices have varied over the years. Promotional requirements are complex; they consist of 1) standards for determining who may compete for promotions (eligibility standards); 2) standards for determining who will be promoted (eligibility for promotion); and 3) standards for determining the order in which those who compete will be promoted (promotional model weights and their application). Complicating any analysis is that these requirements have shifted in relative weights from year to year and that for some periods, the Department had two classifications for the lieutenants rank with separate lines of progression leading to each classification.

1. The Racial Make-up of the Department's Supervisory Ranks 1967-1974

In 1967, blacks represented 2.1% of the Department's supervisory workforce. 9 (2.6%) of the 348 Sergeants and 2 (1.3%) of the 158 Lieutenants were black. The ratio of black sergeants to black police officers was 1:25. The ratio for whites was 1:12. The ratio of black lieutenants to black police officers was 1:114. For whites the ratio was 1:26.

By June of 1974, these numbers had multiplied; there were 61 black sergeants and 11 black lieutenants. However, when expressed as a percentage of the overall pool, the numbers were still minuscule. The reason is that the number of white

sergeants and lieutenants had mushroomed. The number of white sergeants increased from 339 in 1967 to 1,124 in 1974. The number of white Lieutenants increased from 156 in 1967 to 219 in 1974. Thus, despite the significant numerical increase, the Department in 1974 was 5.1% black at the sergeant's level and 4.8% black at the lieutenant's level.

The significant increase in the number of supervisory officers was not paralleled by a corresponding increase in the numbers of patrolmen and patrolwomen.[28] Between 1967 and 1974, the increase in their numbers was moderate — from 3757 to 4006. The Department thus became top-heavy with supervisory officers. The overall ratio of sergeants to police officers was reduced from 1:10.8 to 1:3.4. The ratio of lieutenants to police officers was reduced from 1:23.8 to 1:17.4. White officers benefited greatly from the numerical increase in the supervisory ranks. The ratio of white sergeants to white police officers was reduced from 1:10.4 to 1:2.8. The ratio of black seargeants to black police officers was reduced from 1:24 to 1:14.3. Similarly, the ratio of white lieutenants to white officers was reduced from 1:22.7 to 1:14.3. The ratio of black lieutenants to black officers was reduced from 1:107.5 to 1:79.3.

Undoubtedly, one reason for the disparity in the ratio of black lieutenants to black officers was discrimination against blacks in hiring. The Detroit Police Department, like most police departments, only promoted from within. In other words, only patrolmen who had served in the Department were considered for promotion to the rank of sergeant and only sergeants in the Department were considered for promotion to the rank of lieutenant. No outsiders were brought in at

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[28] Sex-segregation of all ranks of the Department ended in December, 1973, as a result of a suit filed against the Department. *See Schaefer v. Tannian*, 394 F.Supp. 1128 (E.D.Mich. 1974). No issues of sex discrimination are present in this case.

the supervisory levels. Discrimination in the hiring of blacks meant that there were few black patrolmen. And few black patrolmen meant that there were few black candidates available to become sergeants and lieutenants. Defendants, however, allege that in addition, the promotional process was itself discriminatory and thus operated to further reduce the number of blacks who "made it" to the sergeant's and lieutenant's ranks. They also claim that the examination was not job-related. It is these issues which the following sections of this court's opinion address.

2. Promotional Lines of Progression

Until 1964, there were two lieutenant's ranks, with separate promotional job sequences leading to them. "Uniform" sergeants and "uniform" lieutenants functioned on the patrol side; they generally supervised patrolmen at the various precincts. Detectives, detective sergeants, and detective lieutenants functioned on the investigative side.[29] All sergeants and lieutenants functioned as supervisors.[30]

A diagram of the promotional sequences involved follows:

PATROL SIDE	INVESTIGATIVE SIDE
Uniform Lieutenant	Detective Lieutenant
Uniform Sergeant	Detective Sergeant
	Detective
Patrolman	Patrolman

Between 1965 and 1967/68, the two sergeants and two lieutenant's ranks were merged. However, by the time of the 1969

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[29] There also existed a separate command structure for women which was not abandoned until December, 1973. As noted in n. 28, however, this litigation only concerns promotion of male police officers.

[30] As this Court has previously noted, however, black supervisors were only allowed to supervise black officers until the early-to-mid 1960s.

promotional examination, the patrol side and investigative side distinctions were re-established. All distinctions between patrol side and investigative side were abolished in 1970 when the two promotional lines merged and the rank of detective was eliminated. Following the merger, all detectives were upgraded to the rank of sergeant.[31] Since 1970, the job sequence has been: Patrolman (now called police officer) — Sergeant — Lieutenant.

Prior to the merger, there existed separate eligibility standards for promotion to uniform lieutenant and detective lieutenant. However, the written examination was essentially the same for all ranks.

3. The Promotional Process

As indicated *supra*, the promotional model consists of 1) certain minimum eligibility requirements to sit for a written examination, 2) several factors which are scored and combined on the basis of a predetermined formula to produce a final composite score, and 3) eligibility requirements to be promoted. Each of the promotional model's components have varied over the years. In any event, after a final composite score was calculated, the Department created a numerical, rank-ordered "eligibility register" of all candidates eligible for promotion. Promotions to the rank of sergeant were made from the register of ranked, eligible patrolmen. Promotions to the rank of lieutenant were made from the register of ranked, eligible sergeants. The following is a synopsis of the requirements for promotion and the means by which promotional candidates were ranked.

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[31] Although the former Detectives held the same rank and received the same salary as other sergeants, their investigative role continued. The former Uniform and Detective Sergeants continued to perform as supervisors in the precincts and bureaus respectively; they were informally called "executive detective sergeants."

(a) Minimum Eligibility Requirements to Sit for the Examination

The first element of the promotional process established the criteria which defined that class of officers who were entitled to compete for promotion. This first requirement is expressed in terms of the minimum number of years of service required to sit for the written examination.

In 1939, candidates for the Detective examination were required to have a minimum of two (2) years of service.[32]

From 1948 to 1964 the minimum was five (5) years. In 1965 it was reduced to four (4) years and in 1967 to three (3) years.[33] At the rank of Detective Sergeant two (2) years of service in rank of Detective was required.[34]

In 1939, candidates competing for the Uniform Sergeant examination were required to have four and one-half (4½) years of service. Between 1948 and 1962 the minimum was seven (7) years of service. In 1965 the minimum was reduced to six (6) years, and in 1969 to three (3) years.[35] Since the merger of the two sergeant's ranks following the 1969 examinations, candidates for the new Sergeant rank are required to have three (3) years of service. [36]

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[32] Officers with more than eight years of service were not eligible to sit for the exam.

[33] Beginning in 1969 the minimum could be reduced to 2½ years if the candidate had completed two years of college. If he possessed a college degree, the minimum was 2 years.

[34] In 1969 the in-grade minimum could be reduced to one year if the candidate had completed two years of college.

[35] *See* n. 33, *supra*.

[36] *See* n. 33, *supra*.

In virtually all years since 1939, candidates for promotion to the rank of Detective Lieutenant or Uniform Lieutenant were required to have a minimum of two years of service in the rank of Detective Sergeant or Uniform Sergeant respectively.[37]

(b) The Components of the Promotional Model

The factors and weights used to produce the composite score have varied substantially over the years. The major elements[38] of the model and the relative weight assigned to each are set forth in the margin.[39]

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[37] Beginning in 1965 the in-grade requirement could be satisfied in either the Detective Sergeant or Uniform rank and the in-grade minimum could be reduced to 1½ years if the candidate had completed two years of college.

[38] Credit was also given for military service. In addition, beginning in 1969 up to two percentage points were awarded for college education.

[39]

DETECTIVE

Exam	Written Exam	Service Rating	Oral Interview	Seniority
1939[a]	50	12	8	6
1940	50	15	15	6
1942	60	20	20	6
1947	60	20	20	10
1948	50	35	15[b]	9
1950	45	35	20	9
1955	50	30	20	9
1960	50	40	—	10
1964	55	30	—	15
1965	50	35	—	15
1967	55	35	—	10
1969	60	30	—	10

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DETECTIVE AND UNIFORM SERGEANT[c]

Exam	Written Exam	Service Rating	Oral Interview	Seniority
1939-40	50	15	15	6
1943	60	20	20	6
1945-47	60	20	20	10
1948	50	35	15[d]	10
1950	45	35	20	9
1955	50	30	20	9
1957-60	50	40	—	10
1962-64	55	30	—	15
1969	55	30	—	10
1970-73	60	30	—	8

DETECTIVE AND UNIFORM LIEUTENANT

Exam	Written Exam	Service Rating[e]	Oral Interview Prom.Rtng.[f]	Seniority
1940	50	15	15	6
1943	55	20	25	6
1945-47	55	20	25	10
1948	50	35	15[g]	10
1950	45	35	20	9
1955	45	30	25	9
1957-60	40	30	20	10
1962-65	45	20	20	15
1967	45	20	25	10
1969	50	20	20	10
1970-73	50	20	20	8

[a] In 1939 and 1940 up to 20 percentage points were awarded for "training and experience."

[b] In 1948 a "qualification and merit review test" was substituted for the oral interview.

[c] In 1939 the weights applicable to these ranks were not identical.

[d] *See* n. b, *supra*.

(*footnotes continued on next page*)

(1) Service Ratings

Service Ratings are the performance evaluations that are prepared semi-annually by supervisory officers. They contain the supervisors' written appraisal of the subordinate's job performance during the preceding six months.

Since 1962 service ratings have been assigned a value of 20% of the officer's score on the Lieutenant's promotional model. Until 1967 an average of the last four service ratings were used to derive the score that was applied to the model. Thereafter, an average of the last two was used.

(2) Promotional Ratings

Between 1969 and 1973, promotional ratings accounted for twenty percent of the composite score on the lieutenants', but not the sergeants', promotional model. Lieutenants' promotional ratings were given by superior officers within the Department and they tended to mirror service ratings. They were eliminated from the promotional model in 1974 because it was determined that these ratings did not contribute to an evaluation of an officer's potential for success as a lieutenant.

(3) Seniority

In 1965, seniority accounted for 15 percent of the final composite score on both the sergeant and lieutenant promotional

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[e] Before 1969, the service rating component was determined by taking an average of the candidate's last four service ratings. Beginning in 1969 the average of the last two service ratings was used.

[f] An "oral intereview" was conducted by Department supervisory was used until 1957 when it was replaced by a "promotional rating."

[g] *See* n. b, *supra.*

models. [40] In 1967 it was reduced to the 1960 level of 10 percent.[41] The Department determined that after 5 or 6 years of service, additional time on the job did not contribute materially to improved job performance and that the seniority component of the model had an adverse impact on the promotional opportunities of minorities. For these reasons, in 1970 the weight accorded the seniority factor was reduced to eight percent.[42]

(4) The Written Promotional Examination

The written promotional examination is the single most important component of the promotional model. It has been the subject of extensive argument and commentary in this litigation. This Court will fully discuss the claims which have been made by each side concerning the written examination later in this opinion.

(5) Veterans Preference and College Credits

The City Charter mandated a veterans' preference. A promotional candidate's composite score was increased by ½ a percentage point for each year of wartime military service up to a maximum of 2 percentage points. In order to encourage police officers to obtain a college education, a promotional candidate's composite score was increased by one half of a

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[40] In 1940 seniority was weighted at only 6 percent of the promotional models for both ranks. Its weight was raised to 10 percent in 1942 and remained at approximately that level until 1962.

[41] In 1967 and 1969, seniority points could be accumulated at the rate of one-half a percent for each year of service.

[42] The Department also changed the way seniority was computed to ½ of one percent per year for the first through the 10th year of service, ¼ of one percent per year for the 11th through 20th year of service and ⅛ of one percent for the 21st through the 24th year of service. This method of calculation slightly favored officers with long tenure in the department.

percentage point for each year of college up to a maximum of two points. This college credit bonus was first added in 1969.

(c) Additional Eligibility Requirements for Promotion

In 1973, the Department began to impose educational requirements to be eligible for promotion. In 1973, 10 semester hours of college credit were required. This minimum was raised in succeeding years, but a grandfather clause exempted officers who had 12½ years of service with the Department as of December 31, 1973.

(d) The Mechanics of the Promotional System

The process leading to the publication of the 1973 sergeants' and lieutenants' eligibility register[43] illustrates how the system worked.[44] The notice of examination was published on November 1, 1973. It announced the time and place of the examination, the factors and weights to be applied to create the eligibility register, the duties encompassed by the job, and the knowledge, skills and abilities an incumbent was expected to possess. Prior to the date of the examination, the Department conducted a promotional class which all officers were encouraged to attend.[45] Candidates wishing to claim veterans' preference points or college credit points[46] were required to

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[43] The first set of affirmative action promotions under challenge in this litigation were made from this register.

[44] As is discussed below, the model was substantially changed in 1974. However, the 1973 model is representative of how promotional procedure worked pre-1974.

[45] Almost every candidate attended these classes.

[46] In that year (1973), the Department began phasing in college education as an eligibility requirement to sit for the written examination. Officers with over 12½ years of service were exempted from the requirement. In addition to this, college credit would increase a promotional candidate's composite score by one half of a percentage point for each year of college

submit appropriate proof by a certain date. The written examination was administered on December 16, 1973 and, as in other years, was graded anonymously.

Since 1972 candidates have been permitted to challenge test items they believed to be faulty. If the item is found to be faulty, it is omitted for all candidates. In addition each candidate is permitted to review his scored examination and may question it.[47] An adjusted written examination score of 70 is assigned to candidates whose raw score is at the fifieth percentile of all officers sitting for the examination. Thus, candidates falling below the fiftieth percentile received test scores below 70 and were ranked along with those who scored above 70.

Service ratings are calculated by taking an average of the last two performance evaluations (also called service ratings) received by the candidate prior to sitting for the written examination. As for candidates competing for promotion to the rank of lieutenant, separate promotional ratings were also made by the candidates' direct supervising officers. Both the service ratings and promotional ratings were completed prior to the time examination results were available.

The candidates' adjusted written examination score, service ratings, promotional rating, seniority credit, college credit and veterans preference points were then weighted and combined on the basis of the pre-assigned values given each of these components to produce a final composite score. Candidates were then listed on an "Eligibility Register" in rank order on the basis of the final composite score. The assigned weights for the 1973 lieutenant's promotional model were: written test, 50%; service ratings, 20%; promotional rating 20%; seniority, 8%, college and veterans preference, 2% each.

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[47] Candidates were also allowed to question a score received on any other component of the promotional model.

No candidate was required to attain any minimum score on any component part of the promotional model in order to be placed on the Register. Rather, the Department simply estimated the number of promotions it expected to make during the life of the Register and placed a sufficient number of names on the list to satisfy those needs. Thus for example, the Department ultimately placed the first 233 of the 518 candidates that sat for the 1973 Lieutenant's written examination on the Eligible Register.

4. Discrimination within the Promotional Model

Prior to 1973, the Department did not maintain statistics by race of applicants for promotion to sergeant or lieutenant. However, as noted earlier in this opinion, the number of black sergeants and lieutenants was minuscule, even when compared with the small number of black officers. In 1967, for example, the Department was approximately 6% black, yet only 2.5% of the sergeants and 1.3% of the lieutenants were black.

Before the Department was eventually integrated, discriminatory job assignments took their toll as blacks were generally excluded from desirable positions such as scout car and cruiser assignments, supervisory functions and desk clerk assignments. Each of these positions generated high service ratings and was eagerly sought after by upwardly-mobile white officers.

Black officers complain that their white supervisors gave them deliberately low service ratings, promotional ratings and oral interview scores. Determining the trust of this claim is difficult, although there is no question that the black officers thought it was true. This Court has referred above to the documented discriminatory effect of subjective decisions made in the police hiring process. Given the inferior status of blacks within the Department until at least the mid-1960s, it is

reasonable to infer that similar discrimination took place in subjective evaluations within the department.

The most discriminatory aspect of the promotional model, however, was clearly the heavily weighted written examination. Before 1969, the same written examination was given for promotion to all ranks between detective and lieutenant. Every promotional examination up to that time included as an essential component a standarized I.Q. test such as the Otis, Otis-Lennon, the Hinden-Nelson, the California Short Form Maturity Test. In addition, each section of the test was rigidly timed.

In 1968, Commander Richard Caretti was assigned to the personnel examiner's office.[48] He started out by working closely with the Vickery Committee, composed of seven industrial psychologists and personnel officers, which was studying the written examination used at the hiring level. Mr. Caretti observed the administration of the 1969 promotional examination, but had no part in developing its content.[49] It featured rigid time limitations and, in place of the I.Q. test, a verbal inventory test and a Reading Comprehension test. Both tests proved unsatisfactory for many reasons and were not used again.

Thereafter, Commander Caretti assumed increasing responsibility for the promotional exams. He convinced his superiors to drop both intelligence testing and rigid time tolerances on the 1970 exam. However, the Department did retain various general vocabulary and aptitude tests which were administered in the 1970 and future testings. In 1972, aptitude tests using general vocabulary and word analogy formats were administered, although their weight was reduced.

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[48] He was then a lieutenant.

[49] That examination was developed by a Pennsylvania State University psychologist.

In 1973 the Department abandoned these tests and adopted a new vocabulary test which was also used on the 1974 and 1976 examinations. In both 1972 and 1973, the Department also used the Watson-Glaser Critical Thinking Appraisal which is designed to measure general intelligence.

As the Department downgraded aptitude and I.Q. testing on the promotional exam starting in 1970, it expanded testing in the areas of police administration and supervision and police-community relations. The trend is apparent from the following table of the approximate weights accorded the verbal abilities, intelligence, and general knowledge and supervisory principles' sections of the lieutenants' examination:

Yr. of Lt. Examination	Verbal Abilities	Intelligence	General Knowledge
1966	20 %	33.3%	6.7%
1967	26.2%	32.8%	6.6%
1969	31.6%		15.8%
1970			
1972	11.4%	11.4%	45.7%
1973	11.1%	11.1%	22.2%
1974	14.8%		33.3%
1976	12.8%		26.3%

As Commander Caretti noted at trial, both general aptitude tests and I.Q. tests have long been recognized as having an adverse impact on minorities.[50] There was no doubt in his

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[50] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n. 6, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 335-38 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).

mind that the promotional exam prior to 1970 was discriminatory. Nor is there any doubt that the exam was not job-related. Indeed, the Uniform Guidelines,[51] 29 C.F.R. § 1607.14C(1) prohibit the use of intelligence or aptitude tests in any selection procedure which claims to be content job related.[52]

III. DEFENDANTS' PAST DISCRIMINATION MODEL — AN ANALYSIS

The defendants, as part of their showing of past discrimination, introduced an analysis of the relevant labor market to be applied here and presented a concomitant estimate of the number of blacks one would expect to be lieutenants today had the Department not discriminated against blacks for so many years. Any attempt to reconstruct the past is inexact and open to question. The plaintiffs have launched a massive attack on the analysis presented. Because of the difficulties involved, this Court will deal with this issue in this separate section of this opinion.

A. Relevant Labor Market

[1] As this Court indicated in its earlier opinion granting defendants' motion for partial summary judgment, 483

[51] The Uniform Guidelines on Employee Selection procedures were adopted by the EEOC, the Civil Service Commission and the Departments of Labor and Justice on Agusut 25, 1978. 43 Fed.Reg. 38290 *et seq.*, *reprinted at* 29 C.F.R. § 1607 *et seq.*

[52] This prohibition is based on the recognition that there is no inherent correlation between test behavior and work behavior. For example, one can infer that doing well on a vocabulary test means that a person can also communicate well, but the uniform guidelines mandate stronger evidence than this to support the assumption.

In the case of intellience or aptitude testing, there is simply no evidence that persons who do well on these tests are better workers in any job than those who do not perform as well.

F.Supp. 919, relevant labor market analysis is a difficult factual question. Probative evidence of race discrimination exists if the number of blacks hired or employed is disproportionate to the number of blacks who apply or who are available in the local job market. *See Hazelwood School District v. United States*, 433 U.S. 229, 310-13, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Intern'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20, 342 n. 23, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The relevant labor market, or "labor pool" is composed of the group of qualified people from whom an employer draws applicants. Thus, in the case of teachers, the relevant labor market might be the number of qualified teachers in the metropolitan area. *See Hazelwood, supra.*

Two distinct elements make up the relevant market: qualifications and geographic location. In this case, the entry-level qualifications for police officers in Detroit from 1945 to the present were not strict. The principal requirements were age (21-30, later 18-32) and education (high school level). It is true that other requirements existed such as no credit problems, no police record, vision and height, etc., but they were minor in comparison. Absent discrimination, it would be reasonable to expect that proportionate numbers of black and white males in Detroit between the ages of 21 and 30 who had high school diplomas would apply to the Department and that proportionate numbers would be hired.

The relevant geographic area from which applicants would ordinarily come is the second labor market factor. In 1974, the City of Detroit instituted a residency requirement — all City employees were required to live in the City. From 1974 to the present, it is clear that the relevant labor market area is the City of Detroit.

For previous years, however, there was no residency requirement. The City hired police officers from surrounding suburban areas as well. From this, plaintiffs argue that the

relevant labor market is the Detroit Standard Metropolitan Statistical Area (SMSA), composed of Wayne, Oakland and Macomb counties. In contrast, the comparison which Chiefs Tannian and Hart made during their presentations to the Board of Police Commissioners was the racial composition of the Department and the racial composition of the City of Detroit. As the expert testimony at trial showed, the precise figure is somewhere in between these two figures. It is true that some applicants to the Department came from the surrounding Detroit suburbs, but very few relative to the number of applicants who came from the City of Detroit itself.[53] The expert witness testified that this was in accord with general labor market theory that a person is more likely to apply for a job the closer he/she lives to that job.

B. Defendants' Expert's Analysis

[2] Applying the above principles, the expert witness, Mr. Alan Fechter, estimated the relevant market and its racial composition for each of the years 1945 to 1978. The 1950, 1960 and 1970 census provided the needed data as to the race and qualifications of members of the "labor pool." Mr. Fechter noted the number of black and white male high school graduates in the relevant age ranges.[54] He then adjusted these figures by an "undercount factor" to account for persons missed by the census. Next, he multiplied these

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[53] In 1973, a year the expert found was somewhat typical of long-range patterns, the distribution of applicants was:

Detroit City:	74.65%
Balance of Detroit SMSA:	20.48%
Balance of Michigan:	4.87%

[54] From 1950 to 1968, the Department's age requirement was 21 to 30. In 1968, the age requirement was changed to 21 to 32 and still later to 18 to 32. To approximate these figures, Mr. Fechter examined the 20-29 age range on the 1950 and 1960 census and the 18-34 age range on the 1970 census.

figures by the labor force participation rate, which is the percentage of the population actually working or looking for work. These calculations approximated the number of qualified potential applicants in the area by excluding the uneducated, those too old or young and those unable to work.

Additional adjustments needed to be made. The most important was for geographic location. Since many more persons applied to the Department from the City of Detroit than from the suburbs, much greater weight was given to the number of qualified applicants living in the City. Similarly, the figures in earlier years had to be adjusted because in those years, a greater percentage of people in the SMSA lived in the City of Detroit. Finally, Mr. Fechter made a final adjustment of 6 percentage points because blacks had a higher propensity to apply to the Department than whites.[55]

Mr. Fechter conducted this analysis for each of the years for which census data was available — 1950, 1960, 1970. He then used straightline interpolation and extrapolation to determine the black-white share of the relevant labor market for all other years between 1945 and 1973. One would expect that the hiring of blacks for the years 1945 to 1973 would approximate the percentage of blacks in the above-defined relevant market for each of the years in question. In reality, for each of the years in question except one, Department hiring had a statistically

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[55] This does not contradict testimony that the Department's racial practices deterred blacks from applying to the Department. The evidence is clear that large numbers of blacks applied to the Department year in and year out. This is logical given discrimination against blacks in private industry. The conclusion is inescapable that even larger numbers would have applied absent discrimination.

significant impact against blacks. The following table summarizes Mr. Fechter's overall findings:

Comparison, Racial Composition of Hires and Labor Pool, 1945-1973

Year	(% nonwhite)	Labor Pool Total Hires	Black Hires Estimated	Black Hires Actual	Difference
1945..	13.8	301	42	5	37*
1946..	14.4	304	44	7	37*
1947..	15.1	577	87	17	70*
1948..	15.7	288	45	9	36*
1949..	16.3	414	67	7	60*
1950..	17.0	313	53	3	50*
1951..	17.7	268	47	28	19*
1952..	18.3	328	60	27	33*
1953..	18.9	189	36	10	26*
1954..	19.6	369	72	7	65*
1955..	20.2	327	66	11	55*
1956..	20.9	187	39	11	28*
1957..	21.5	158	34	9	25*
1958..	22.2	14	3	3	0
1959..	22.8	116	26	7	19*
1960..	23.5	90	21	3	18*
1961..	25.1	192	48	7	41*
1962..	26.7	278	74	10	64*
1963..	28.3	179	51	9	36*
1964..	29.9	141	42	6	36*
1965..	31.5	171	54	16	36*
1966..	33.1	205	68	38	30*
1967..	34.8	323	112	71	51*
1968..	46.1	519	239	180	59*
1969..	42.9	561	241	127	114*
1970..	39.5	495	196	101	85*
1971..	40.5	656	266	170	96*
1972..	47.9	613	257	185	72*
1973..	43.0	491	211	149	62*

* Statistically significant from zero at .05 level of probability.

This analysis shows that had the Department hired blacks in proportion to their representation in the relevant labor market, 1,366 more blacks would have been hired than actually were hired. This finding fully corroborates this Court's previous analysis of the hiring model employed by the City, which featured subjective opinion and I.Q. testing which impacted sharply against minorities. This analysis also demonstrates that Chiefs Tannian and Hart were not far wrong when in their appearances before the Board of Police Commissioners they compared the racial composition of the Department with that of the general population of the City. Mr. Fechter's analysis estimates that the relevant labor market was 43% black in 1973. Chiefs Tannian and Hart cited a labor market figure of 50% from 1974 to 1977. As this Court noted in its order granting defendants' motion for partial summary judgment, 483 F. Supp. 919, comparisons between employment statistics, and general population statistics, although sometimes imprecise, can be useful indications of discrimination.[56] That is evident here, especially since Mr. Fechter testified that his figures were understated.[57]

Mr. Fechter then went further and estimated the number of black lieutenants one might have expected, assuming a discrimination-free hiring and promotional model. He conducted an analysis for two years — 1974 and 1978. He took the actual list of lieutenants employed in each of these years and determined in what year each of them had been originally hired as patrolmen. The percentage of non-whites in the relevant labor market for each hiring year was then multiplied by the number of (future) lieutenants hired in each of the years to

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[56] See *Afro-American Patrolman's League* v. *Duck*, 503 F.2d 284, 299 (6th Cir. 1974); *United States* v. *City of Buffalo*, 457 F. Supp. 612, 621 (W.D.N.Y. 1978); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873, 896-98 (C.D. Cal. 1976).

[57] *See* note 58, infra.

arrive at the hypothetical number of non-white officers who would have made it to lieutenant. Mr. Fechter's analysis reveals that there would have been 43 black male lieutenants in June, 1974. In fact there were 9. For 1978, Mr. Fechter's analysis reveals that there would have been 49 black male lieutenants. By then, however, the affirmative action plan had been in effect for several years. As a result, there were 41 black male lieutenants in the Department in 1978.

Plaintiffs seize upon this latter figure and urge that at minimum, it justifies an injunction against any further affirmative action promotions since Mr. Fechter testified that the difference between 49 and 41 was not statistically significant. This ignores Mr. Fechter's testimony that his analysis understates the number of black lieutenants one would expect to find in a discrimination free hiring and promotional environment.[58] This also fails to take into account the City's operational need defense, discussed below. Finally, Mr. Fechter testified that it is currently impossible to quantify the number of blacks who should be lieutenants in future years.

Any analysis like Mr. Fechter's can be attacked as inaccurate on a variety of grounds. There is simply no way to

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[58] Mr. Fechter cited two reasons for this view. First, he assumed that equal numbers of black and white officers stayed on with the Department. However, in the military, black retention rates are far higher than white retention rates. (i.e. 50.6% versus 34.5% in 1978). Mr. Fechter stated that because military and police work is similar, he would expect retention rates to be similar as well.

Second, Mr. Fechter underestimated the propensity of blacks to apply to the Department. He adjusted the racial composition of the labor pool upward by 6% to account for the greater black propensity to apply. In reality, the figures are much higher. In 1967 and 1968, for example, there was a 15% difference in application rates. Out of caution, Mr. Fechter took an average of the low 1970-1973 application rate figures.

reconstruct the past with pinpoint accuracy. The plaintiffs have launched a wholesale assault on Mr. Fechter's analysis and findings. This Court disagrees; it finds his analysis to be creditable and entirely consistent with this Court's previous findings of discrimination. Instead of burdening these pages with a discussion of plaintiffs' attacks on the analysis, this Court will discuss them in a lengthy footnote reproduced at the margin.[59]

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[59] 1. Plaintiffs claim that Mr. Fechter's analysis is flawed because it is based on data concerning applicants to the Department from 1971 to 1973 which was inflated by special recruitment efforts directed to minorities. Mr. Fechter increased the percentage of blacks by 6 percentage points to account for the increased propensity of blacks to apply. Plaintiffs contend that this adjustment is erroneous because in the years in which this propensity was determined — 1971 to 1973, large scale minority recruiting efforts were artificially increasing the number of black applicants. This Court cannot agree. First, this Court has previously found that minority recruiting efforts did not begin to take effect until 1973-1974. Second, Mr. Fechter's analysis of propensity to apply was not based on inflated figures. He examined *qualified* applicants who were eligible to take the written examination in each year from 1967 to 1973. His 6% adjustment was conservative in light of the 15 percentage point difference in black vs. white propensity to apply which existed in 1967 and 1968 — years in which even the plaintiffs concede no significant minority recruiting occurred.

It is true that Mr. Fechter analyzed 1971 applicant data from the Department's preliminary application files and that this data also showed that blacks had a much higher propensity to apply. Had excessive minority recruiting occurred, this data could have been distorted. However, all that it was used for was to corroborate his basic premise that blacks had a much higher propensity to apply than whites.

As a final corollary argument, plaintiffs claim that Mr. Fechter's analyses failed to account for voluntary withdrawals, in violation of EEOC guidelines. See "Interpretation and Clarification of Uniform Employee Selection Guidelines." ¶4175, C.C.H. Emp. Prac. (March 1979). They argue that inclusion of voluntary withdrawals inflated

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Mr. Fechter's analysis of black's propensity to apply since more blacks than whites voluntarily withdrew from the hiring process. The EEOC standard reads as follows:

> "A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification."

There is testimony in the record that for a number of years, disproportionate members of blacks withdrew from the hiring process. It was in response to this problem that the Department instituted a follow-up program to find out why black applicants had dropped out and to encourage them to go through the procedures. The reason why blacks became discouraged, however, was the Department's discriminatory image which, until late 1973-1974, was buttressed by written examinations and other components which screened out disproportionate numbers of blacks. Under these circumstances, Mr. Fechter did not err in including voluntary withdrawals and did not violate the EEOC guidelines.

2. Plaintiffs urge that other factors could account for the disparities in black hiring revealed by Mr. Fechter's analysis. Plaintiffs claim that factors such as different arrest records or the fact that minorities did not like police work could account for the disparities found. This Court disagrees. Mr. Fechter closely approximated the relevant labor market for each of the years in question by controlling for age, education and "membership" in the labor market. It is inconceivable that factors such as height, arrest record or personal preference could account for the disparities. Throughout the years in question, the Department used discriminatory hiring and promotion tests. The Department also discriminated against blacks within the Department at least through the early 1960s. The conclusion is inescapable that factors other than race could not account for the awesome disparities found.

Plaintiffs also argue that it is possible that only the hiring process was discriminatory for the years in question and that the promotional model was racially neutral throughout. This is a theoretical possibility, but ignores the evidence in the record that the promotional model was also discriminatory for many years, notably because it employed I.Q. tests on the written examination.

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3. Mr. Fechter conducted a separate analysis for the years 1971-1973. Racial application data was available for these years. Mr. Fechter took this data and omitted all applicants who had been rejected preliminarily because of age, residence, no drivers license, etc. He then compared the numbers of black and white applicants qualified to take the written examination with the numbers hired. He found a statistically significant difference in each year which gradually narrowed down from 1971 to 1973. In 1971, 36.2% of qualified applicants were black, but only 22.3% of the men hired were black. In 1972, 41.9% of qualified applicants were black but only 25.2% of the men who were hired were black. In 1973 the differential was much smaller — 43% black applicants and 39.8% blacks hired. However, many of the applicants who applied in 1973 were hired in later years. Comparison of black applicants with blacks actually hired in 1973 revealed a statistically significant racial disparity.

Plaintiffs fault Mr. Fechter for not directly testifying that the statistical discrepancies showed discrimination in hiring. Mr. Fechter refrained from drawing conclusions, leaving any final assessment to be made by this Court. Such professional restraint is commendable in an expert witness — and unfortunately is all too rare.

Plaintiffs question Mr. Fechter's analysis on various grounds. First they fault him for failing to analyze the various components of the hiring process for racial impact, citing § 4C of the Uniform Guidelines, 29 C.F.R. § 1607.4c. As defendants point out, such an analysis is only useful in determining the source of *present* discrimination. It makes no difference in this case which parts of the hiring model were discriminatory in 1971-73 so long as it is clear that the model did, overall, discriminate against blacks.

Second, plaintiffs state that large numbers of Mr. Fechter's "qualified applicants" failed to show up for the written examination and that this was especially true of the black applicants. Plaintiffs claim that these "non-candidates" inflate minority representation in the applicant pool and account for any disparity in hiring. A similar argument was made above where plaintiffs claim that large numbers of unqualified blacks flooded the ranks of applicants. This Court rejects it for the same reasons it previously rejected it. The record does not support Dr. Wollack's underlying theory that because of minority recruitment efforts, the Department was flooded with applications from unqualified blacks.

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More important, Mr. Fechter's analysis of applicants for the years 1971-1973 compared those who passed the Department's preliminary screening requirements and were thus qualified to take the written examination. For reasons mentioned above, it was proper to include voluntary withdrawals in the analysis.

Third, plaintiffs state that Mr. Fechter failed to account for reapplicants who may have applied an unknown number of times and that any racial disparity in hiring could be accounted for because the Department kept encouraging minorities to re-take the written examination which they kept failing. Mr. Fechter testified that reapplicants must be considered in analyzing applicant flow data. Dr. Wollack, the plaintiffs' expert, apparently agreed because he used reapplicants in his analysis of the promotional examination. As a check, Mr. Fechter studied the data for 1971 and found that including reapplicants had no statistically significant effect on the racial composition of the applicant pool. Plaintiffs are reduced to arguing that Mr. Fechter did not check on black applicants who reapplied *several times*, — a speculative argument. Dr. Wollack offered a hypothetical alternative explanation for the adverse impact on black officers. Dr. Wollack reasoned that the encouragement of minority reapplications and minority re-testing on the exam accounted for the disparity. In other words, a few minorities failing numerous times distorted the figures. Dr. Wollack wisely conceded the speculative nature of his hypothetical which among other things assumed that no white applicants retested twice while 346 black applicants retested twice in the same year. The actual preliminary application card data demonstrates that Dr. Wollack's theory is meritless:

Applications by Frequency of Application

Race	Year	Total Applications	Once	Twice	Three	Four
Black	1971	2199	1655	227	26	3
	1972	2159	1744	188	13	0
White	1971	3623	2993	283	20	1
	1972	2344	2013	155	7	0

4. Finally, plaintiffs attack the entry-level statistics contained in exhibit 12 as fraught with problems because of large numbers of inconsistencies, computational errors and recording inaccuracies. Dr. Wollack

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IV. 1974 — THE ADOPTION OF AFFIRMATIVE ACTION AND SUBSEQUENT OCCURRENCES

A. The Board of Police Commissioners and the Adoption of Affirmative Action

Previous orders of this court, notably its order granting summary judgment on the issue of actual and punitive damages 483 F. Supp. 919, have outlined how the City's affirmative action plan operated. Although there is no dispute as to how or why the City instituted the affirmative action plan, this Court will sketch the pertinent facts and the setting in which they took place.

The continuing effect of past discrimination was apparent by June of 1974. The Department was, overall, 17.2% black but only 5.15% of the sergeants and 4.78% of the lieutenants were black. The 1973 eligibility registers from which promotions were to be made offered little hope of improvement in these bleak figures. On May 9, 1974, 30 patrolmen were promoted to sergeant in rank order from the top of the 1973 eligible register; 29 of those promoted were white. On May 23, 1974, 11 sergeants were promoted to the rank of lieutenant; all were white. The Department resolved to do something about the sparse numbers of blacks being promoted.

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concluded that the applicant flow records were intrinsically "unbelievable."

Unfortunately, it appears that the good doctor attacked a straw man. The defendants at trial did not rely on the data in exhibit 12 at trial and Dr. Fechter did not use this data in doing his analysis. The reports in exhibit 12 are not applicant flow reports in that they do not trace the progress of particular applicants through the system. Rather, they are status reports of the people in the hiring process at any given time. The figures were not relied upon by the defendants to show past discrimination and were not meant to be so used.

The development of the affirmative action plan and the race-conscious promotions challenged in this litigation resulted from actions taken by the City's Board of Police Commissioners. The Michigan Constitution's Home Rule Provision art. 7 § 22 confers upon the City of Detroit the right of local self-government. The Board of Police Commissioners was provided for in Detroit's City Charter, newly approved by the voters in the 1973 election. Board members were appointed by the Mayor, Coleman A. Young, with the approval of the City Council. Their duties included establishing "policies, rules and regulations" for the Police Department in consultation with the Chief of Police and with the approval of the Mayor. In sum, the Board oversees how the Department is run. The City Charter also expressly provided that all promotions were to be made on the basis of competitive examinations, except that the Board could approve out-of-order promotions at the request of the Chief of Police.

The procedures by which the Board of Police Commissioners[60] approved the affirmative action plan in July of 1974 and by which it has continued to approve affirmative action promotions are undisputed. The procedures are fully outlined in this Court's order granting summary judgment on money damages claims other than backpay, 483 F.Supp. 919. There is no need to repeat all of the details here except to note that in each instance the Chief of Police, Philip Tannian (1974–1976) or William Hart (1976–present) made presentations to the Board of Police Commissioners at public hearings in which the need for affirmative action in promotions was outlined. At

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[60] The original members who constituted the Board of Police Commissioners in 1974 were Douglas Fraser of the United Auto Workers Union, the Reverend Charles Butler, Ms. Susan Mills-Peak, Executive Director of the Concerned Citizens Council, Mr. Alexander E. Ritchie, a Detroit Attorney, Mr. Edward Littlejohn, Professor of Law at Wayne State University.

each presentation, the Chief of Police urged the need to promote more blacks 1) to remedy prior discriminatory employment practices, 2) to overcome present barriers blacks faced in the promotional model; and 3) to meet the Department's perceived operational need for more black officers. In each instance, the Chief of Police presented statistical data showing historically the percentage of blacks as compared to whites at all levels in the Department and the percentage of blacks in the population of the City of Detroit.[61]

Pursuant to the Board's express findings of past discrimination and operational need, all promotions which have taken place from July of 1974 to the present have, with the Board's express concurrence in every case, been race-conscious. As previously indicated, instead of promoting in strick rank order from the eligibility lists, the Department promoted at an approximate 50-50 black-white ratio. Thus, if the Department had 20 openings for lieutenant, it promoted the top ten (10) white candidates off of the eligibility register and the top ten (10) black candidates off of the eligibility register.[62] These race-conscious promotions were made off of the 1973, 1974 and 1976 lieutenant's eligibility lists. As a practical matter, promotion of equal numbers of black and white candidates meant that the Department had to "dip down" on the eligibility register to promote blacks. White candidates who would have been promoted had strick rank order been followed, as was customary in the past, felt that they had been "passed over" solely because they were white. And, because they ranked higher on the eligiblity list than the blacks who were

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[61] *See* n. 56, *supra* and accompanying text.

[62] Some "dipping" had taken place in the past when the Chief of Police made individual preferential promotions of persons ranked lower on the eligibility list. Most such "dipping" occurred on promotional lists from patrolman to sergeant, i.e. persons who had served as bodyguards and/or drivers to the Mayor.

promoted under the affirmative action plan, the white officers who were "passed over" felt that they were better qualified than the affirmative action-promoted black officers.[63] The result was this lawsuit.

The Court notes that the Department did place a limit on how far it would "dip" to promote blacks under the affirmative action plan. No candidate was promoted who did not score at least at the 50th percentile on the written examination. Instead of reaching below this level, the Department would give a new written examination and draw up a new eligibility register. The Court also notes that no specific timetable has been established for the termination of the affirmative action plan. Instead, the Board has been periodically approving affirmative action promotions, concluding in each instance that although progress has been made, much remains to be done and affirmative action should continue. There is also evidence in the record that the Board deferred setting a cut-off date for affirmative action until this litigation is resolved.

Finally, this Court will repeat some of the observations made in its order granting summary judgment. There is no question that the Board acted in good faith and that it was well aware of the sensitive questions it presented. The Board was well aware of the impact any affirmative action plan would have on white officers, and sought to balance the competing interests. The testimony at trial of Edward Littlejohn, former Chairperson of the Board and Professor of Law at Wayne State University illuminated this concern clearly:

> Q: And you also indicated, I believe, that the Board of Police Commissioners was aware at the time the affirmative

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[63] The hotly-disputed question of the relative qualifications of the black officers vis-a-vis the "passed over" white officers is discussed below in section V.

action resolution was adopted in 1974 that this policy would have an adverse impact upon white males who placed higher on the list for promotion to lieutenant but were passed over by reason of that policy . . .

THE WITNESS: . . . There certainly was existing injury and continuing injury, not only to black officers in the Police Department and in our view, the citizens of Detroit and the City as a whole, but in choosing between the adverse impact of existing conditions and the perpetuation of the injury to minority officers and the untenable situation that we considered to be existing in the community, so, on the horns of the dilemma, you choose, I suspect the less evil of the choices and the one that is going to cause the greater good; and from that kind of context, we recognize no matter which decision the commission made, there would be an adverse impact and certainly the affirmative action program would cause an impact adversely on individual white officers at the time the program was adopted and implemented.

But, again, I say that balance was struck between the other competing — what we felt were the more compelling interests than those you asked about.

B. The Promotional Model 1974 — Present; An Overview

The affirmative action promotions challenged in this litigation were made from three eligibility registers. These registers were compiled after the administration of written promotional examinations in 1973, 1974 and 1976, the scores of which were plugged into the appropriate promotional model. The 1973 promotional model has already been discussed at length. *See* Section IIB3(d), *supra*. The 1974 and 1976 promotional models were substantially different, although the written

examinations, heavily weighed in each model, were substantially the same.[64] Another eligibility register was prepared following a promotional examination given in 1977. However, no promotions have been made off of this most recent register and the City has represented that none will be made pending the outcome of this litigation.

1. Immediate Background

By mid-1974, the Department's efforts to improve its hiring procedures and remove all racially discriminatory aspects from them had just recently taken hold. In addition, Commander Caretti was in the midst of his efforts to improve the written promotional examination. Whether Commander Caretti had succeeded in making the examination job-related (i.e. whether doing well on the examination meant that a candidate would probably make a better lieutenant) is a hotly-disputed question which is discussed below.

There is no question, however, that the 1973 and 1974 promotional examinations were not themselves discriminatory. Plaintiff's expert witness, Dr. Stephen Wollack, performed a statistical analysis of the 1973 promotional model to determine whether the eligibility registers resulting from that model would have had an adverse impact on blacks absent affirmative action — i. e. whether a disproportionate number of whites would have been promoted if rank-order had been followed. He concluded that there was no statistically significant difference in selection rates between white and black candidates. In other words, the 1973 promotional model did not,

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[64] 1974 and subsequent promotional models differed from the 1973 promotional model in four significant areas: 1) An innovative oral board procedure was introduced; 2) the weight accorded seniority was reduced; 3) in-grade seniority was added to the model; 4) the weight given the veterans preference was further reduced so that a candidate could accumulate a maximum of two points.

by itself, impact against blacks under the criteria of § 4D of the Uniform Guidelines on Employee Section Procedures.[65] Correspondingly, the heavily weighted written examination was similarly non-discriminatory. Dr. Wollack found that there were no statistically significant differences in the passing rates of white and black candidates in 1973.

Dr. Wollack made similar findings regarding the 1974 and 1976 promotional models. In fact, he found that these models discriminated against white applicants because even absent affirmative action, 23% of the black candidates but only 11% of the white candidates would have been promoted. Consistent with this analysis, in 1976, 71% of the black candidates passed. To Dr. Wollack, this result was novel and inexplicable.

The explanation for this unusual situation was obvious to then-Chief of Police Philip Tannian.[66] Although blacks did as well as whites on the promotional model, there were very few black sergeants who were eligible for promotion to the rank of lieutenant. For example, only 26 and 35 black males, respectively, competed in the 1973 and 1974 lieutenants examinations respectively. These blacks were the "survivors" who had endured a discriminatory hiring system when they first applied to the Department and who had then endured a discriminatory promotional process when they advanced from patrolman to sergeant. These black officers competing in the 1973 and 1974 lieutenant's examination had thus managed to overcome two levels of screening which had a severe adverse impact on minorities. In the jargon of the expert witnesses, the

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[65] § 4d, 29 C.F.R. § 1607.4d, provides that a test or selection device for hiring or promotion has an adverse impact if the difference in selection rates is less than 80% of the rate for the group with the highest selection rates. In addition, the difference must be statistically significant.

[66] It was also obvious to the Equal Employment Opportunity Commission in its report finding no cause for plaintiff Bratton's Title VII complaint.

black sergeants who were applying for promotion to lieutenant constituted an "atypical pool" of (super-achieving) applicants.[67]

Viewed from another perspective, there would have been many more blacks eligible for promotion and many more blacks promoted had discrimination at the application level not severely reduced the number of blacks available to be promoted. This is apparent from the testimony of black officers at trial. Inspector Melvin Williams testified that he failed the Department's written entrance exam many times over a five year period before finally passing it and being appointed to the department. Not only would he have been able to take the lieutenant's examination years earlier had he been appointed to the Department earlier, he also would have received additional years of seniority credit which would have assisted him in placing higher on any eligibility roster which he was on. There is similar evidence in the record regarding other black officers such as Joseph C. Brown who failed the written entrance examination in 1958 but passed it and was appointed more than eight years later. Similarly, McKinley Douglas first applied for a position with the Department in 1958 but failed the written examination four times before passing it and being appointed in October of 1966. Plaintiffs openly conceded that the Department intentionally discriminated against Vivian Edmond. There is no way to recreate the past and determine where any given individual would be today absent

[67] Yet another conceptual view is that the promotional structure is pyramidal. However one characterizes it, it is clear that where all promotions to lieutenant derive from a pool of sergeants who in turn come from a pool of patrolmen, the selection of lieutenants reflects discrimination in the previous selection of sergeants and in the hiring of patrolmen.

past discrimination.[68] The conclusion is inescapable, however, that when viewed as a class, many more blacks would have been present in all ranks, including that of lieutenant, had discriminatory practices not been followed.

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[68] The case of Lieutenant Kenneth Johnson illustrates well the continuing effects of the Department's discrimination. Lt. Johnson first applied with the Department in July of 1962, but failed the written examination. He reapplied and failed the examination again in September, 1962. He finally passed the written examination in December, 1962. However, a Department physician advised him that he could not be approved unless a hemorrhoidal condition was corrected. A private physician advised the Department in writing that Lt. Johnson's condition would not affect his performance, but the Department held its position. Lt. Johnson was eventually appointed to the Department on May 13, 1963, after having corrective surgery.

Lt. Johnson sat for the sergeant's exam in 1967 and 1969, but was not promoted. In April of 1972, he sat for the exam a third time. After some corrections on his ranking were made, he ended up ranked 470. A total of 450 promotions were made from the 1972 eligibility register. Had Lt. Johnson been appointed to the Department when he had first applied, his added seniority score would have placed him within the first 450 persons promoted.

On December 16, 1973, Lt. Johnson sat once again for promotion to sergeant. He ended up being ranked 86, but only after successfully appealing a service rating on the grounds of intentional racial discrimination by the supervisor who rated him. In addition, of the six sections on the examination, Lt. Johnson performed least well on the verbal inventory section and Watson-Glaser critical think section, ranking in the 45th and 50th percentile, respectively, of those who sat for the exam. This is unsurprising because such non-job related tests have traditionally impacted against minorities. What Lt. Johnson's ranking would have been absent these sections is unknown.

Lt. Johnson was promoted to the rank of Sergeant on August 1, 1974; one of the first beneficiaries of the Department's Affirmative Action plan. Since 150 persons were ultimately promoted from the 1973 sergeant's eligibility list, he would have been promoted anyway; but at a later date.

(footnotes continued on next page)

The plaintiffs concede that the above explanation, fully outlined in the testimony of defendants' expert witness, Dr. Richard Barrett, is "reasonable." Plaintiffs attempt to rebut the apparent fact that a highly select, atypical pool of black candidates competed for promotion to lieutenant by focusing on the results of the 1976 lieutenants examination. Plaintiffs argue that the pool of black sergeants available for promotion to the rank of lieutenant in 1976 had been artificially increased by affirmative action promotions of blacks from patrolman to sergeant in 1974, 1975 and 1976 and that there was thus no discriminatory screening effect at the lower sergeant's promotional level. Plaintiffs' expert, Dr. Wollack, did an analysis of the 226 black and 965 white patrolmen who sat for the 1973 sergeants' examination. Because of affirmative action promotions of blacks from the rank of patrolman to the rank of sergeant, large numbers of these black sergeants were eligible to sit for the 1976 exam for promotion to the rank of lieutenant. Dr. Wollack calculated that of the 226 black and 965 white patrolmen who sat for the 1973 sergeants' examination,

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On May 31, 1976, Lt. Johnson sat for the written exam for promotion to lieutenant and ranked 96 on the eligibility register. Correction of an error in his service rating results in a ranking of 90. Had Lt. Johnson been promoted in 1972 instead of 1974, he would have obtained the 3.0 maximum seniority credit for time-in-grade at the sergeant's rank. He would have ranked 86 on the eligibility roster. Since 88 promotions were made from this roster, he would have been promoted had the "regular" promotional scheme been in effect. Instead, Lt. Johnson was promoted to the rank of Lieutenant under the Department's affirmative action plan in August of 1977.

Lt. Johnson's case demonstrates the effect of "double screening" at the lieutenant's rank. Absent discriminatory testing, Lt. Johnson would probably have made it to the rank of Lieutenant by 1977. The affirmative action promotions which Lt. Johnson benefitted from, in a very real sense, only made up for past discrimination against him.

14 of the blacks (6.19%), but only 7 of the whites (.07%) would have been promoted to the rank of lieutenant absent affirmative action at that level. According to Dr. Wollack, this analysis disproves defendants' "double screening" theory.

This Court cannot agree. First, this analysis deals only with promotions made from the 1976 eligibility register; plaintiffs implicitly concede that the 1973 and 1974 lieutenants' examinations perpetuated past discrimination against blacks. More importantly, plaintiffs analysis is incomplete for a variety of reasons. Plaintiffs' analysis is based on a small fragment of what would otherwise, in the absence of discrimination, be a typical pool of black applicants. Absent from plaintiffs' analysis are blacks who were discriminatorily screened out for years at the entry level and those similarly screened out at the sergeants' level. Simply stated, Dr. Wollack's analysis did not include the whole picture.

Dr. Wollack's own testimony demonstrates that even with the impact of affirmative action at the sergeants' level, there still existed an atypical pool of black candidates competing for promotion to the rank of lieutenant. Dr. Wollack found that there was a statistically significant impact against white male officers on both the 1976 lieutenants' written examination as well as the overall 1976 promotional model. In fact, the pass rate on the written exam for black male officers was 71% while that of white male officers was only 49%.

Dr. Wollack could not account for this discrepancy. He claimed to have never seen such a discrepancy in favor of blacks. Normally, adverse impact on written cognitive tests was against blacks, not whites. Further, such adverse impact against blacks is generally maximized by a high cut-off score and rank ordering which rewards high scores as opposed to passing scores. All of these factors were present on the written examination. Dr. Wollack conceded the above, but still would

not provide an explanation for the pro-black, anti-white impact of the examination. Dr. Barrett's analysis provides such an explanation.[69]

2. Efforts to Improve the Promotional Model

Shortly after the adoption of the Affirmative Action Program, in July of 1974, the Department made additional efforts to improve the promotional model.

On August 16, 1974, then Chief of Police Tannian made a preliminary announcement to the Board that the Department had revamped its promotional model for lieutenants. Before obtaining Board approval of the new model, Chief Tannian reviewed it with the then president of the Lieutenants and Sergeant's Association (LSA), Joseph Clark. After making some changes to suit the LSA, Tannian obtained Board approval of a similar, though less job related model on August 30, 1974. The model that was approved and implemented included the following changes:

1. A minimum written examination passing score of 70 percent was imposed;

2. The weight accorded the written examination was increased from 50 to 55 percent of the model;

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[69] Dr. Wollack did state that a "double screening" effect could reduce the number of blacks available for promotion, but maintained that this would not account for the startling percentage disparity in black vs. white performance on the written examination. It appears intuitively obvious to this Court that since only the very best blacks survived the double screening which took place, that it is unsurprising that a group of them might do better on a written examination than whites. The Court also notes that a statistically significant disparity favoring blacks only occurred on the 1976 examination. At the very least, this type of unexplained fluctuation indicates that an atypical pool of black applicants is present at the lieutenants level.

3. An oral promotional evaluation board with a weight of twelve (12) percent was introduced in place of the promotional rating;

4. Regular seniority was accorded a weight of 6 percent of the model and was to be earned at the rate of 1¼ percent per year of service for the first four years and one (1) percent for the fifth year;

5. A new "ingrade" seniority factor was established and was to be earned at the rate of one (1) percent per year from the date of appointment to the rank of sergeant up to a maximum of three (3) percent of the model.

The new promotional model was in several respects a substantial improvement over the prior model. Seniority had been effectively downgraded. Only the in-grade seniority component affected an officer's position on the lieutenants' eligibility register.[70] The promotional rating, which in the opinion of Commander Caretti had an adverse impact on minorities[71], and which was otherwise of little demonstrated value, had been eliminated. In addition, some improvements were made on the written examination. Most importantly, an oral board, which for the first time sought to measure intangible leadership and personality qualities that are regarded as essential for lieutenants, was introduced.

a. Oral Boards

The oral board procedure was developed by two outside psychologists hired by the Department. It was introduced because the Department wished to measure certain abilities

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[70] The Department's experience with the three examinations administered since the adoption of the new model revealed that virtually every officer who achieved a position on the lieutenants eligibility register was awarded the maximum regular seniority credit.

[71] The reason for this was that minorities had less seniority and promotional ratings, like service ratings, tend to correlate with seniority.

which it thought were not being measured by the other components of the promotional model. Commander Caretti described the purpose of the oral board as follows:

> There were a number of purposes. We felt that it might enhance our ability to measure dimensions that weren't being probed anyplace else in the promotional process. Since this is a City with a large minority population, we felt that certain aspects of attitudes should be measured — attitudes toward minorities, attitudes towards the whole police-community relation process, excessive force and its application, ethics in Police Work, poise, judgment, logical thinking. We thought these factors that weren't being measured anyplace else in our process were very important in terms of their presence or absence in our supervisors.

In the past, the Department had used an oral interview as part of the promotional model. It was one of the devices which now Deputy Chief James Bannon testified was used to exclude black officers from the higher ranks in the 40's and 50's. Recognizing that an oral interview procedure could be abused, the Department built safeguard procedures into the system to assure objectivity and fairness. The members of the oral board are drawn from the supervisory ranks of major law enforcement agencies other than the Detroit Police Department. Each candidate for promotion who scores above the fiftieth percentile on the written examination is interviewed by a panel consisting of one black and two white officers. The interviewers are given special training by professional psychologists before any candidates are interviewed.

Each panel member is required to make an independent evaluation without prior discussion of the candidate with other panel members. Conformity with this requirement is

assured by the presence of Department and union representatives to witness the scoring process. Generally the interview lasts 30 to 45 minutes.[72]

Commander Caretti, who has overseen the process since its inception in 1974, testified that it is one of the more effective parts of the promotional model for predicting the potential of candidates to perform effectively as lieutenants. He based this conclusion on his personal observation that the officers he knew to be good performers received high ratings and those who he knew to be poor performers got low ratings. Chief Hart agreed with Commander Caretti's assessment. Former Chief Patrick Murphy was in agreement as to the importance of gauging the skills and abilities measured by the oral board.

Plaintiffs' position on the oral board procedure is curious. They appear to applaud the institution of the oral board and commend the attempt to measure the qualities which the oral board is designed to measure. However, they complain because the affirmative action plan allowed most blacks who passed the written exam alone to be promoted. Thus, they argue, blacks were promoted regardless of their oral board scores while whites' oral board scores directly affected their ranking. Whatever force this argument has is dissipated by

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[72] Just prior to the interview the candidates must draw a card which determines the panel by which he will be interviewed. By a similar random method he then selects a series of hypothetical fact situations for which supervisory action should be taken. Before the panel he must rank the relative seriousness of each of the situations and then outline how he would deal with two of them. He must defend his judgments and respond to questions from the panel members until they are satisfied that they know enough about the candidate to rate him or her in each of the ten (10) designated areas.

the fact that the blacks who were promoted had oral board scores equal to whites who were promoted.[73]

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[73] Dr. Wollack did testify that the oral board is discriminatory against white officers "in its content and result." The reason was that the oral board was concerned with "attitudes toward minorities," which is one of the 10 rating scales, and that many of the fact situations dealt with racially-oriented subject matter. Dr. Wollack emphasized that no similar ratings were made regarding black officer's attitudes toward whites. Further, Dr. Wollack's statistical analysis revealed that black candidates had an 80% chance of obtaining an above-average score on the oral board while white candidates only had a 43% chance.

This Court sees nothing wrong with the oral board's concern with anti-black attitudes. The reason is that anti-black attitudes within the Department have been a serious problem for many years. As this Court will discuss later in this opinion regarding the defendants' operational need defense, tensions between the black community and the still predominantly white police department have been a serious problem in Detroit. The need to change anti-black attitudes and practices has been recognized by responsible City officials since at least the 1967 Riot, which the National Advisory Commission on Civil Disorders found was caused in large measure by discriminatory police practices.

There is nothing in the record which suggests that anti-white attitudes by blacks currently present a problem which requires similar attention.

If anti-white attitudes develop or prove to be a problem in the Department, there is nothing to prevent the City from moving to combat them. Indeed, the City has every incentive to do so since, as it emphasized at trial, effective police work depends on cooperation with all citizens.

In equating the need to check for anti-black attitudes with the need to check for anti-white attitudes, Dr. Wollack ignored the sad history of police-community relations in Detroit which appears clearly in the record. Given this history, the City cannot be faulted for emphasizing the problem of anti-black attitudes at the oral boards.

Dr. Wollack, however, did provide a probable explanation for why blacks did better at the oral boards than whites — blacks are more sensitive to the problem of racial prejudice, especially anti-black prejudice. The oral board procedure which Dr. Wollack regarded as discriminatory to whites, in reality, operated to test for an important trait.

b. The Written Examination

This Court has already commented on some of the changes made on the written examination. Basically, the Department, through Commander Caretti, tried to improve the exam from 1970 through 1974, the last year in which changes were made. In that year, Commander Caretti dropped the general aptitude Watson-Glaser Critical Thinking Appraisal Test and attempted to redesign the verbal inventory section of the exam to make it more job-related. After the 1974 examination, Commander Caretti wanted to make additional changes, but was told not to because the City was locked in a labor dispute with the Lieutenants and Sergeant's Association and the examination was, to an unspecified degree, in issue.[74]

c. Eligibility for Promotion

The Department continued its policy of increasing the educational requirements for promotions. In 1974, officers were required to have 30 quarter or 20 semester hours of college credit to be promoted to lieutenant. In 1976, 45 quarter or 30 semester hours were required. In 1977, the requirement was raised to 70 quarter or 40 semester hours.

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[74] Defendants attempted to present testimony regarding the labor dispute and why all exam changes were frozen in 1974, but plaintiffs strongly objected, claiming that to do so would damage the confidentiality of the pending labor negotiations. The parties eventually presented a vague stipulation regarding what occurred. In their brief, however, plaintiffs attempted to blame the City for not improving the examination more. Given the unsettled state of the record, the only reasonable conclusion to draw is that the City's moratorium on further improvements on the written examination was bona-fide.

V. THE MATTER OF RELATIVE QUALIFICATIONS

The Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs and Local Government Agencies," 41 Fed. Reg. 38, 814 (Sept. 13, 1976) endorses the adoption and implementation of affirmative action programs, including the use of goals and timetables. The guidelines outline the desirability of affirmative action which emphasizes relative qualifications:

> Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes, that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.

A key theme which runs throughout plaintiffs' case is that the black officers who were promoted "ahead" of the white officers were not as qualified.[75] They point out that the City

[75] Plaintiffs are careful not to argue, however, that the affirmative action promotees are unqualified. Rather, they argue that the out-of-order promotees were less qualified than the white officers who were passed over.

"dipped" down on the eligibility register to promote blacks. Thus, as a group, the black officers ranked lower on the eligibility register than white officers who would have been promoted absent affirmative action.

A. The Written Exam

[3] In order to "make it" onto the promotional eligibility roster in any given year, a candidate had to score above the 50th percentile on the written examination. Where that candidate ranked on the list, however, depended on a variety of factors and the weight accorded each factor in a given year. See section IV, *supra*. The most important factor in any given year was a candidate's score on the written examination, which was always in excess of 50% of the final composite score which is used to rank candidates. Given the heavy weight that has always been accorded the candidate's written exam score, those with the highest test scores have placed highest on the eligibility register. This is apparent from a review of the 1973, 1974 and 1976 lieutenant's eligibility registers. Those candidates who scored highest on the written exam dominate the top of the registers. The principal issue, then, is whether the officers who were better test-takers were necessarily those with the best potential to be lieutenants.

Put another way, it is important to assess whether the written examination, and/or the promotional model was "job related." By definition, a job-related examination or selection procedure is one which can be demonstrated to have a manifest relationship to the job. In the ordinary case, when a hiring or promotional procedure is found to discriminate against minorities, the employer has a heavy burden of showing that the selection procedure is job-related. The recently promulgated Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 *et. seq.* outline in detail how this

must be done. Basically, an employer must show that an examination was either "content valid,"[76] "criterion valid,"[77] or "construct valid."[78] *See e.g. Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *United States v. City of Chicago,* 573 F.2d 416, 425-27 (7th Cir. 1978). Demonstrating this is not easy. *See e.g. Firefighters Institute For Racial Equality v. United States,* 549 F.2d 506 (8th Cir. 1977) (Fireman's promotional exam did measure many necessary skills, but was not content valid because it did not measure supervisory skills). A properly conducted job validation study is both costly and time-consuming.

It is undisputed that neither the written exam nor the overall promotional model in this case has been proven to be job-related. The City never performed a proper job-validation study.[79] Of course, a hiring or promotional system could still

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[76] This requires a thorough, individual task analysis of the job to be performed. All or nearly all important parts of the job must be covered on the test and the test's content must clearly approximate the job.

[77] This requires that test scores correlate with proven criteria of successful job performance.

[78] This requires that the test measure certain characteristics in job applicants and that these same characteristics be proven to be important to job performance.

[79] Plaintiffs claim that the defendants should be estopped from arguing this issue because they were derelict in not performing a job-validation study. This Court disagrees. The City undoubtedly acted in good faith at all times and tried to improve both its hiring and its promotional tests. Preliminary validation studies were done by Andres Inn and John Furcon on the promotional examination which indicated that the Department was on the right track. Finally, as is discussed below, to accept plaintiffs' argument is to wreck all voluntary affirmative action efforts.

The plaintiffs also argue that it is irrelevant whether the promotional model and/or the written promotional exam were job-related. They point out that under Title VII, as interpreted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), an employer need show that its written examination or selection device is job-related only when

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be job-related in fact but not be proven to be job-related for failure to perform the proper validation study. This is precisely what plaintiffs claim has happened in this case. They point to Commander Caretti's diligent efforts over the years to eliminate discredited I.Q. testing and to make the written exam reflect what a lieutenant needed to know. They emphasize that Commander Caretti was earnest and energetic in his efforts to put together a valid examination. He used incumbent lieutenants, including black lieutenants, to draw up questions. He attended professional seminars and kept up with the literature. Plaintiffs conclude by endorsing Commander Caretti's conclusion that the exam was job-related.

The Commander's good faith and diligence are not in dispute. However, good faith and diligence do not always a job-related exam make. It is understandable why Commander Caretti would testify that the examinations he worked so hard to perfect were job-related. However, defendants' expert, Dr. Richard S. Barrett, testified that based on his review of the written examinations, he had no reason to conclude that any of the sergeant's or lieutenant's examinations from 1966 through 1976 were content-valid.[80] Plaintiffs' psychometrician, Dr. Wollack testified that he could not tell whether or not

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the exam or selection device is discriminatory. If a written examination or selection device does not have adverse effects on blacks or other minorities, the employer does not have to show that it is job-related. *See EEOC v. Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976).

As a general statement of the law, plaintiffs are correct. However, in this case, the promotional model perpetuated past discrimination. Moreover, the issue of relative qualifications is a factor which is useful in determining the reasonableness of the voluntary affirmative action program here in question. *See* Section VI C4, *infra*.

[80] Although the sergeant's and lieutenant's examinations were not identical from 1973 to 1976, they were substantially similar.

the Department's promotional examinations were job-related.

At trial and in their brief, the defendants attacked the job-validity of the examination. They claimed: 1) that the written examination placed heavy emphasis on intelligence and aptitude tests, 2) that the test items call for memorization of unessential, detailed information which can and is easily looked up by lieutenants on the job, 3) that the Department used inappropriate measures of reading comprehension, 4) that many of the test items are poorly constructed, and 5) that the exam does not approximate the work behavior of a lieutenant.

An examination of each of the examination sections raises serious doubts as to the job-validity of the examination: This Court's section-by-section analysis is reproduced in the margin.[81]

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[81] 1. Departmental Rules and Procedures Sections of the Written Examination.

This section of the exam is undoubtedly job-related. In order to do his job properly, a lieutenant must have a "thorough knowledge" of departmental organization, rules, regulations and procedures. Even here, an appropriate study would distinguish between the need to know certain fundamental rules and procedures and the need to memorize trivia which an actual lieutenant would simply look up in department manuals. The problem is that this section of the exam has never been weighed very heavily. In 1973, this section was 16.7% of the exam; in 1974, 22.2%; in 1976, 19.2%.[a]

[a] The following chart reveals the exam's weight over the years:

Year of Lt. Examination	Weight of Department General Orders Section
1966	10.0%
1967	9.8%
1969	16.2%
1970	
1972	8.5%
1973	16.7%
1974	22.2%
1976	19.2%

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This table was computed by the defendants and presented in their very good brief to this Court. The percentages were derived by dividing the value of the section on General Orders and Training Information Bulletins by the sum of the relative value of each section of the examination times the number of items in the section. The plaintiffs have not challenged defendants' mathematical computations.

2. Laws and Criminal Procedures Sections of the Examination

This section of the exam is undoubtedly also job-related — at least in theory. It is vital for a lieutenant to have knowledge of the laws which he and his men (or women) enforce and of the limitations which the law imposes on police practices. Lieutenants well-versed in the law are a must, both to guide the officers below them and to oversee the handling of a variety of arrest and search situations.

As defendants point out, however, the knowledge which should be tested for is that which is needed in emergency situations, or at least those situations where the lieutenant cannot easily look up the answer. Unfortunately, the examination in 1976 and earlier tested for details which a lieutenant need not have memorized, but could always look up.[b] In addition, many of the questions dealt with areas of the law which only a prosecutor would need to know.[c] Dr. Barrett's testimony illustrated this problem:

[b] For example, the 1976 examination required knowing that in Michigan manslaughter carries a maximum sentence of 15 years, that the crime of burglary with explosives carries a minimum 15 year penalty, what are the elements of the crime of embezzlement, and whether a set of facts constitutes first or second degree murder. So long as an officer — or lieutenant — knows whether a particular set of facts is illegal activity, what specific crime is involved or what the possible sentence may be is not critical knowledge. The lieutenant could easily look up this additional information or consult with a prosecutor.

[c] For example, the 1976 examination required knowledge that the best evidence rule applies to documentary evidence and of some of the exceptions to the hearsay rule.

Q. You are looking at the 1976 lieutenants exam?

A. Yes. Section 4, which is on page 44, has to do with criminal law fundamentals of criminal investigation.

Now, I will just read some of these in order: Number one is — they are true and false items in this section — although the United States Constitution is referred to as the supreme law of the land, where it is in conflict with the Michigan constitution, the Michigan constitution prevails

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Now, I don't see anything in the description of the job which says that the police lieutenants make decisions on that level.

Number 6 says, "The Tenth Amendment to the United States Constitution as interpreted by the United States Supreme Court governs the conduct of a search by a private person as well as a search by a peace officer."

Now, that's not what the lieutenant needs to know. He needs to know what searches can be conducted by a private person and what searches can be conducted by peace officers. This question doesn't get at that issue. It gets at a general issue, which is really not related to his performance on the job.

Questions of this kind that are not related to the behavior of the police officer. . . Some of these questions have to do with the admissibility of evidence, which is the business of lawyers and judges, not of police lieutenants, and so forth.

3. Verbal Skills Section of the Examination

This Court has previously noted in discussing the pre-1973 Lieutenant's examinations that they included verbal abilities sections which were not job-related and had an adverse impact on minorities. These were general vocabulary and word analogy aptitude tests. In 1974 and 1976 verbal skills tests were also used, although Commander Caretti made valiant efforts to relate the vocabulary to police work. It is true that good reading and writing skills are highly desirable in a lieutenant, as are good oral communication skills. Unfortunately, despite Commander Caretti's best efforts, the written test was inadequate to measure these skills.[d]

[d] Apparently there exists no written test which satisfactorily measures reading and writing ability well enough to satisfy the uniform guidelines.

As Dr. Barrett testified at trial the verbal inventory tests used in 1974 and 1976 were specifically prohibited by the Uniform Guidelines.

4. Intelligence and General Knowledge Sections of the Examination

A police lieutenant ideally possesess a number of important personal qualities: Initiative, resourcefulness, ability to lead, sensitivity, even temperament, common sense. These abilities go to the core of being a good lieutenant. Over the years the Department has tried to measure these abilities on its written examinations. Before 1970, various I.Q. tests were used. Recently, the Department has presented candidates with a massive bibliography of police-related source materials and has asked questions from these materials on the examination. The difficulty throughout has been that the qualities which the Department has sought

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In sum, the written exam is not job-related. It has not been validated, as required by the Uniform Guidelines. Although Commander Caretti thought that the exam was job-related, he is not qualified to make that judgment. Of those who were qualified, Dr. Wollack, plaintiffs' expert, would not say that it was job-related while Dr. Barrett, defendants' expert testified that the exam could clearly not meet the validation guidelines. This Court's review of the examination confirms Dr. Barrett's analysis.

Plaintiffs argue that the City cannot have it both ways. It cannot argue that the written examination is not job-related

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to measure are not amendable to testing on a written examination. It was in partial recognition of this fact that the Department instituted the oral board procedure in 1974.

In practice, the general knowledge section is clearly not job-related because the questions asked are not from "that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior." 29 C.F.R. 1607.15(c)(4). Dr. Barrett testified that the questions asked placed: "a high premium on the ability to read and memorize material from books without any indication that this material is ever applied by the individual." For example, on the 1976 lieutenant's examination, there were 30 questions testing the candidate's recall of material contained in a book entitled "Supervision of Police Personnel."[e] In the words of Dr. Barrett:

> [e] 22 questions from this same book were asked on the 1974 examination.
>
> I think most psychologists will agree that one does not learn how to supervise by reading a book and one is not a better supervisor by having remembered what some authority said about the supervision process.
>
> This part of the written examination placed a high premium on the ability to read and memorize that which is contained within the bibliographic materials. Those who are good crammers get the highest score. However, the best crammers are not necessarily the best lieutenants.[f]

[f] Although Commander Caretti thought that the examination was job-related, he admitted that he would expect incumbent lieutenants to do poorly on the written examination unless they too crammed.

but at the same time argue that the black officers promoted under the affirmative action program were qualified by virtue of their having attained a minimum score on the exam. The reason is that virtually every black officer who made it onto the eligibility roster was promoted. And the sole criterion for making it onto the eligibility list was to score above the 50th percentile on the written examination. The plaintiffs argue that if the written examination is not job-related, then there is no assurance that the black officers promoted out of sequence are competent since all they had to do to get promoted was score a passing grade on the written exam.

This argument has much force. Defendants partially refute it by emphasizing that there are *degrees* of job-relatedness. This is unquestionably true. An I.Q. test has very little relationship to job performance. An examination which tests knowledge of bibliographic material relating to police work, such as the general knowledge section on the 1974 and 1976 Lieutenant's exam discussed above at n.81, is much more job-related. As this Court has indicated, such a test section is not job-related under the stringent requirements of the Uniform Guidelines. However, it undoubtedly possesses *some* degree of job-relatedness, especially when compared to an I.Q. test.

Defendants bolster their argument by noting that what has the most impact in terms of job-relatedness is the effect of the examination on *rank order*. Thus, they argue that the exam is sufficiently job-related that the high cut-off score insures that all candidates on the list have the minimum knowledge to be lieutenants. However, the exam is not sufficiently job-related to differentiate among the candidates who make the list. This Court is in full agreement with the latter proposition. The former proposition is more difficult. Courts have recognized that a test may be valid as a means of rejecting the basically unqualified but not valid to determine the best qualified applicants among a large pool. *See Ass'n Against Discrimination v.*

City of Bridgeport, 454 F.Supp. 751, 756-57 (D.Conn.1978); *Stamps v. Detroit Edison*, 365 F.Supp. 87, 118 (E.D.Mich.1973); 29 C.F.R. § 1607.15(c)(9). However, there is no credible evidence in the record that the exam cut-off score by itself, was adequate to insure minimal qualifications for promotion.[82]

The discussion which follows, however, demonstrates that the former proposition is true and that the black officers who were promoted out of sequence were as substantially equally qualified as the white officers promoted in strict rank order.

B. Service Ratings

[4] Plaintiffs do not seriously press their argument that the written examination is job-related or that the white candidates promoted were more qualified than the black candidates promoted because the former performed better on the written exam than the latter. Instead, the plaintiffs claim that the white officers who were "passed over" for promotion in favor of the black officers were better qualified because the white officers received significantly better service ratings as sergeants.

Dr. Wollack's analysis demonstrated that the white police officers who were "passed over" received significantly higher service ratings than the black officers who were promoted under the affirmative action plan. Dr. Wollack also concluded

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[82] Although Commander Caretti testified that the written exam cut-off score assures that all on the eligibility list are qualified, on cross-examination, he modified this stance and testified that only through application of the entire model could adequate qualification be assured. Thus, Commander Caretti would presumably not find qualified a candidate who had barely passed the written examination but who had scored very low on both service ratings and the oral board. However, no minority promotional candidate appears to have come close to this extreme example. Commander Caretti testified that the candidates promoted out of order were qualified to be lieutenants.

that the service ratings were racially neutral: first, because there was no correlation between the race of the officer receiving service ratings and the race of the members of the ratings teams, and secondly, because the differences in service ratings were accountable by differences in tenure or job experience. On the 1974 and 1976 lieutenant's eligibility roster, approximately three-quarters of the black candidates had less than 3 years time-in-grade (as sergeants); approximately three-quarters of the white officers had more than 3 years time-in-grade. Commander Caretti agreed that when job tenure is taken into account, the service ratings are racially neutral.

Both sides agree that service ratings correlate with job experience. Those promotional candidates who were sergeants for the most years got the highest service ratings. The parties differ in their interpretation of this fact. Plaintiffs argue that job experience as sergeant is a valid measure of a candidate's ability to successfully perform the job of lieutenant. Simply stated, they claim that the white officers who got the better service ratings were better qualified because they had more experience. They point to testimony by Chief Hart and former Chief Patrick Murphy that good performance as a sergeant is an essential prerequisite for promotion to lieutenant.[83]

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[83] The Fourth Circuit in *Freind v. Leidinger*, 588 F.2d 61 (4th Cir. 1978) reached similar conclusions regarding service ratings given to black and white firemen with different experience on the job:

> The lower court was not persuaded by appellant's statistical showing that blacks received lower fitness ratings from their supervisors than whites. It was bothered by the fact that most blacks receiving such ratings were new recruits and were being compared with whites, who were experienced firemen . . . In fire fighting, experience is very important, and, as pointed out by the trial judge, a rookie firemen may be outstanding in comparison with other rookies but merely acceptable when measured against the job standards and an experienced fireman may be outstanding when measured against the job standard, but only

(footnote continued on next page)

An equally plausible explanation for the better service ratings given the white officers is advanced by the defendants. They argue that the raters tend to give longer-tenured officers higher service ratings merely because they are longer-tenured. Dedendants emphasize that as a general rule, raters give out high service ratings to all officers. The natural tendency is to give even higher service ratings to the longer-tenured officers. In effect, defendants claim that those who give out service ratings are biased not in favor of whites, but in favor of officers who were sergeants longer. For reasons outlined in the following section, this Court accepts defendant's explanation.

C. Confirmation Service Ratings and Officer Candidate School Scores

Thus far, the issue of relative qualifications is muddled. The black officers who benefitted from affirmative action received oral board scores comparable to the white officers

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(footnotes continued from previous page)

average when measured against his peers on the force. In using figures that compared firemen with the same amount of seniority the court found that blacks receiving "more than acceptable" or better ratings was 94.5% of the rate of whites receiving the same ratings and, therefore, there was no adverse impact for the group for which reliable and comparable statistics were available. *id.* at 66-67.

The Fourth Circuit may have been correct regarding rookie firemen, but in this case each candidate for promotion to lieutenant had served for years at both the patrolman and sergeant's level. It is not obvious that many years of experience at the sergeant's level necessarily make one a better lieutenant.

who would otherwise have been promoted. The black officers did not do as well on the written examination, but that exam was clearly not a proper ranking device. Finally, it is true that the white officers received superior service ratings as sergeants compared with the black officers. However, it is not clear whether this was because the white officers were in fact better or because the raters favored officers with more tenure.

The definitive answer to the relative qualifications question is provided by defendant's analysis of confirmation service ratings. As indicated above, Dr. Wollack, on behalf of the plaintiffs, analyzed the candidates' service ratings as *sergeants* and found that those promoted out of sequence, under the affirmative action plan, were significantly inferior performers than the white candidates who would otherwise have been promoted. However, Dr. Robert Dugan, an expert witness for the defendants, performed several analyses of how the affirmative action promotees were rated as *lieutenants*. All lieutenants receive "confirmation" service ratings approximately one year after they have served in that rank. Dr. Dugan examined the lieutenant's service ratings of "out-of-sequence" black officers (including women) and "in sequence" white officers (including women). Off of the 1973 eligibility list, Dr. Dugan had the service ratings of 8 officers promoted out of sequence and 20 officers promoted in sequence. He found no statistically significant difference in the mean scores of both groups. Off of the 1974 lieutenants eligibility register, he had the service ratings of 9 officers promoted out of sequence and 27 officers promoted in sequence. The mean scores of the two groups were not significantly different. Off of the 1976 lieutenants eligibility register, he had scores for 19 officers promoted out of sequence and 40 officers promoted in sequence. The mean scores of the two groups were not significantly different. Nor is the result any different if one omits females and compares the rating of black male officers

promoted out of sequence with white male officers promoted in sequence. The results are reproduced in the following table:

Confirmation Service Ratings (Male Officers)

Year	Group	Number of Cases	Mean Score	Difference
1973.....	Out of Sequence	7	82.4	.4
	In Sequence	20	82.0	
1974.....	Out of Sequence	7	83.2	2.8
	In Sequence	27	80.4	
1976.....	Out of Sequence	16	79.5	3.1
	In Sequence	40	82.6	

The differences are not statistically significant for any of the years in which affirmative-action promotions were made.

In addition, Dr. Dugan conducted an analysis comparing the two groups of officers' performance on written examinations taken at Officer Candidate School. (OCS). All officers selected for promotion attend OCS classes for six weeks and must successfully complete the course before being assigned to the rank of lieutenant. Each candidate takes a written test at the beginning and at the end of OCS. Dr. Dugan compared mean scores received on these examinations by black officers promoted out of sequence with scores received by white officers promoted in sequence. He found no statistically significant differences. The following tables outline his findings.

OCS Test Scores (Equal Sample Sizes)

Year	Group	Number of Cases	Mean Pre-test Score	Mean Post-test Score
1973....	Out of Sequence	11	66.73	93.27
1973....	In Sequence	11	62.82	96.18
	1973 Difference		3.95	2.91
1976....	Out of Sequence	22	64.82	85.17
1976....	In Sequence	22	65.59	84.91

Male OCS Test Scores

Year	Group	Number of Cases	Mean Pre-test Score	Mean Post-test Score
1973....	Out of Sequence	11	67.30	93.50
1973....	In Sequence	12	63.42	96.50
	1973 Difference		3.88	3.00
1976....	Out of Sequence	20	64.30	85.80
1976....	In Sequence	19/49	65.48(N = 19)	85.82(N = 49)
	1976 Difference		1.54	.02

Plaintiffs attack Dr. Dugan's analysis on two grounds.[84] None of these attacks are convincing..First, plaintiffs point to a number of computational errors.[85] Able counsel for the plaintiffs examined Dr. Dugan in detail concerning these errors, but in the final analysis, this Court finds them insignificant and credits Dr. Dugan's assurance that "there are no errors in any table I have presented that will have any significant difference in any matters before this Court."

Second, the plaintiffs accuse Dr. Dugan of "significance shopping." As indicated above, Dr. Dugan's comparison of OCS scores is based on equal sample sizes. That is to say, Dr. Dugan compared OCS scores of those promoted out of sequence with a *sample* of white officers promoted in sequence. Plaintiffs claim that Dr. Dugan hand-picked the samples to

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[84] They also attack Dr. Dugan's analysis of the oral board scores of black officers promoted out of sequence and the officers "passed over" for promotion. As indicated above, Dr. Dugan had concluded that there are no statistically significant difference in the mean oral board scores of the two groups of candidates.

[85] There were some errors which Dr. Dugan caught and corrected before testifying. Also, an error cropped up on two exhibits. An error in addition occurred in exhibit 164-H which was carried over to exhibit 194 table B. The latter exhibit indicates that a total of 1172 officers sat for the 1974 sergeants examination, of whom 852 were white. In fact there were 1173 officers who sat, of whom 853 were white.

achieve the desired results and that Dr. Dugan should have compared the scores of officers promoted out of sequence with all officers promoted in sequence. This Court finds no basis to these allegations. Only officers who are promoted to the rank of lieutenant receive OCS scores and confirmation service ratings. Thus, there is no way to directly compare the OCS scores and confirmation service ratings of the black officers promoted out of sequence with those of the white officers who would have been otherwise promoted, but who were "passed over." Instead, Dr. Dugan did the next best thing and compared the confirmation service ratings of the black officers with those of the white officers promoted in sequence who had headed the eligibility list. On direct examination, Dr. Dugan compared equal sample sizes of confirmation ratings for members of the two groups. For 1973, for example, he compared the confirmation ratings for eight of the officers promoted out of sequence and those for eight of the officers promoted in sequence. On cross-examination, counsel for the plaintiffs questioned the manner in which Dr. Dugan chose his sample of white officers. Similar questions were raised regarding the samples Dr. Dugan selected for 1974 and 1976. In response, on redirect examination, Dr. Dugan compared all confirmation service rating scores which were available for officers promoted in sequence as well as out of sequence. As indicated above, there were no statistically significant differences between them.

Dr. Dugan did take even sample sizes in his analysis of OCS scores. However, he testified, without contradiction, that it was appropriate to do so given the small numbers involved. More importantly, there is no indication that in taking a sample of the OCS scores of white officers, Dr. Dugan deliberately distorted his results by selecting atypical scores for the white officers. Significantly, the plaintiffs did not present expert testimony

which either questioned his methodology or the accuracy of his results.[86]

D. Summary

Defendant's analysis of confirmation service ratings demonstrates that the black officers promoted out of sequence were as qualified as the white officers promoted in sequence. This conclusion is also supported by the fact that both groups received similar oral board scores — a crucial indicator of good performance as a lieutenant, according to Commander Caretti.

Finally, there is the trial testimony of various officers, including Chief Hart, that the officers promoted out of order were performing as well as lieutenants as those officers promoted in order. It is true that Chief Hart is a strong proponent

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[86] In their brief, plaintiffs point to exhibit 195 as an example of Dr. Dugan's alleged data manipulation. That exhibit, however, deals with the completely separate question of the appropriate weight which the various components of the promotional model in fact had on the candidates' position on the eligibility list. Dr. Dugan basically concluded that the written examination, which had a weight of 50% in 1973 and 55% in 1974 and 1976, in fact had a true weight of 82% and 84% respectively. The reason is because of the effect of rank ordering. A higher written examination score was much more important to one's ultimate rank on the list than anything else. The technique Dr. Dugan used to determine true weight is known as "multiple regression." On cross-examination, Dr. Dugan conceded that the result would differ depending on how one inserted the various promotional variables into the equation. Because of this concession, plaintiffs claim that improper data manipulation took place. This Court disagrees. Dr. Dugan stated that the differences would be "slight." On redirect examination, Dr. Dugan confirmed his judgment that the calculations in exhibit 195 accurately represented the true weight of the various components of the promotional model. Plaintiffs offered no countervailing testimony on this issue. Indeed, Dr. Wollack, plaintiffs' expert, on cross-examination conceded that rank ordering on the basis of a cognitive test generally maximizes the adverse impact on minorities who do not do well on such tests.

of the affirmative action plan. He is also a professional police officer with a distinguished record of service. There are currently slightly more than 200 lieutenants in the Detroit Police Department who help supervise approximately 1,100 sergeants and 4,000 police officers. Lieutenants hold vital command positions in the Department. If affirmative action resulted in the promotion of less than qualified officers, the effect on the Department could be severe. Chief Hart and the Board of Police Commissioners have every incentive to promote the most competent candidates, especially to the rank of lieutenant. Thus, there is good reason to credit Chief Hart's testimony that the officers promoted out of order were equally qualified and have performed well.

The above findings indicate that the exam cut-off score was, by itself, adequate to ensure that only well-qualified blacks were promoted under the affirmative action plan.[87] These findings also confirm that the difference in the service ratings received at the sergeant's level by the member of each group promoted can be attributed solely to raters favoring senior officers because they were senior.

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[87] The Court notes once again that the black officers involved here are the "survivors" who remained after a discriminatory hiring process and a discriminatory promotion process to sergeant. As more and more black officers become eligible for promotion, the exam cut-off score may become inadequate to assure high quality, by itself. Thus far, however, it appears that the written exam was sufficiently job-related to assure that all who passed were qualified.

VI. THE LEGAL STANDARD FOR VOLUNTARY AFFIRMATIVE ACTION

Plaintiffs in this case have brought suit under Title VI and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d[88] and 2000e;[89] the post-civil war civil rights acts, 42 U.S.C. §§ 1981;[90] 1983;[91] the United States Constitution,[92] as well as Michigan State law.[93] All of the above provisions outlaw discrimination because of race.

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[88] Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[89] In relevant part, Title VII provides:

(a) it shall be unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

[90] § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[91] § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to

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It is undisputed that the City's affirmative action plan promoted officers on the basis of their race and that absent affirmative action, white officers would have been promoted where black officers were in fact promoted. By choosing equal numbers of white and black officers according to their rank on the promotional eligibility list, the Department effectively bypassed a group of white officers.

Plaintiffs claim that this was blatant discrimination against them as whites which is illegal under the abovementioned statutes and the Constitution. A theme which they embrace is that there should be no difference between discrimination

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be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The *Bratton* plaintiffs alleged a violation of 42 U.S.C. § 1985(3) in their initial complaint, but dropped this claim in their amended complaint. The Baker plaintiffs, however, have alleged a 1985(3) cause of action throughout.

§ 1985 provides that persons who conspire to deprive others of their civil rights are liable for resulting injuries. § 1985 is broader than § 1983 in that it reaches some private action. *See Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). However, to the extent that state action is involved, as in this case, § 1983 and § 1985 are coextensive.

[92] The Equal Protection Clause of the Fourteenth Amendment provides in relevant part:

"... [N]or shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

[93] Plaintiffs claim a violation of Art 1, Section 2 of the Michigan Constitution; the Michigan Fair Employment Practices Act, M.C.L.A. § 423.301 *et. seq.*, M.S.A. § 17.458(301) *et. seq.*; the Elliot-Larson Civil Rights Act, M.C.L.A. § 37.2201 *et. seq.*, M.S.A. § 3.548(201) *et. seq.*

against whites and discrimination against blacks. In a perfect world, plaintiffs would be correct. The world has been far from perfect for blacks, however. It has been especially far from perfect for blacks in the Department and blacks who applied to the Department. The City did not act to favor blacks out of malice toward whites, or even capriciousness. It acted to favor blacks because as a class, they had been subject to debilitating discrimination for years on end. The affirmative action program is unquestionably a racial preference and it unquestionably impacts against white officers. It is also an admittedly imperfect remedy which seeks to offset past discrimination undergone by blacks, specifically black officers. Reconciling the rights of white and black officers is not easy. Whether the City acted reasonably when it adopted its affirmative action plan is the principal question for this Court.

A. The Legal Claims

[5] As a threshold matter, there is no question that Title VII jurisdictional requirements have been met. The plaintiff class representatives filed timely complaints with the Equal Employment Opportunity Commission and then brought this suit. *See* 42 U.S.C. § 2000e *et. seq.* Similarly, this Court has jurisdiction over the §§ 1981, 1983 and 1985(3) claims under 28 U.S.C. § 1343(3) and (4).[94] The Court doubts that it has jurisdiction to hear the Title VI claims because that act limits enforcement actions such as this to cases "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3. In any event, it appears from *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) that Title VI's

[94] This act confers jurisdiction on federal district courts to hear claims alleging deprivation under color of state law of any right "secured by the Constitution of the United States or by any Act of Congress Providing for equal rights of citizens . . ." or of rights "under any Act of Congress providing for the protection of civil rights."

mandate tracks that of the constitution's equal protection clause. *See id.* at 287, 98 S.Ct. 2733 (opinion of Powell); *id.* at 325, 98 S.Ct. 2733 (opinion of Brennan, J.). Thus, this Court's analysis of the constitutional claim will be dispcsitive of any Title VI claim. The same is true of the § 1983 claim. That statute merely provides a cause of action in federal court for either statutory or constitutional violations. Thus the § 1983 claim restates the constitutional claim.

[6] Similarly, plaintiffs' Title VII claim should be regarded as coextensive with the § 1981 claim. As the Supreme Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 and n. 7, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974), "legislative enactments in [the civil rights] area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." Title VII and § 1981 are distinct and have distinct origins. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). However, "[i]n fashioning a substantive body of law under § 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976) quoting *Waters v. Wisconsin Steel Workers of Int'l Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974). *See also Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *EEOC v. Detroit Edison*, 515 F.2d 301, 309 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d 267 (1977); *Long v. Ford Motor Co.*, 496 F.2d 500, 504-06 (6th Cir. 1974).

In sum, plaintiffs' claims should be examined in three distinct areas: 1) Title VII and § 1981; 2) the constitutional claim, also present in the § 1983 and Title VI claim; 3) state law claims.

B. The Title VII and § 1981 claim

Plaintiffs have contended throughout that Title VII "prohibits an employer from granting preferential treatment in the name of affirmative action in order to correct a racial imbalance between the community and the workforce." Plaintiffs concede that a federal court has authority under Title VII and/or § 1981 to order preferential hiring and promotions of blacks or members of other groups, provided there is a clear showing of past discrimination and the court finds that affirmative action relief is warranted. This is true in the Sixth Circuit[95] as well as virtually every other Circuit which has considered the question.[96]

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[95] *See EEOC v. Detroit Edison*, 515 F.2d 301, 317 (6th Cir. 1975), vacated and remanded on other grounds, 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d267 (1977); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *Sims v. Sheet Metal Workers, Local 65*, 489 F.2d 1023, 1027 (6th Cir. 1973); *United States v. IBEW Local 212*, 472 F.2d 634, 636 (6th Cir. 1973); *United States v. IBEW Local 38*, 428 F.2d 144, 149-51 (6th Cir. 1970). *But cf. Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *cert. denied* 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 396 (1979).

[96] See, e.g., *Morgan v. Kerrigan*, 509 F.2d 599 (1st Cir. 1975); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1026-1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Patterson v. Newspaper Deliverers' Union*, 514 F.2d 767, 773-775 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976); *Rios v. Steamfitters, Local 638*, 501 F.2d 622, 628-633 (2d Cir. 1974); *EEOC v. A.T. & T. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *United States v. Elevator Constructors, Local 5*, 538 F.2d 1012 (3d Cir. 1976); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 273-275 (4th Cir. 1976), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1194 (5th Cir. 1976), *cert. denied*, 419 U.S. 861, 97 S.Ct. 163, 50

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Plaintiffs claim, however, that the authority to impose a quota is unique to a court — an employer has no right to voluntarily initiate affirmative action. In the alternative, plaintiffs urge that race-conscious affirmative action is an extraordinary remedy which can only be used in unique circumstances. Plaintiffs claim that for a variety of reasons, affirmative action was not warranted in this case. Finally, plaintiffs claim that even if affirmative action may have been warranted here, they should not be victimized by it. At the very least, the City should be required to pay them "front pay" and other damges, even if black officers end up with the promotions. Each of these contentions deserves careful analysis. As this Court noted in its opinion granting defendants' motion for partial summary judgment, 483 F.Supp. 919, the issue of voluntary affirmative action is difficult and unsettled. However, the Supreme Court's recent opinion in *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.ED.2d 480 (1979) has done much to resolve difficulties in this area.

(1) The Weber Decision

Weber presented a situation somewhat similar to the one here. The Kaiser Aluminum and Chemical Corporation opened a plant in the town of Gramercy, Louisiana in 1958.

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L.Ed.2d 139 (1976); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1093 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *Crockett v. Green*, 534 F.2d 715, 718-719 (7th Cir. 1976); *United States v. N.L. Industries*, 479 F.2d 354, 377 (8th Cir. 1973); *Carter v. Gallagher*, 452 F.2d 315, 327 (8th Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *United States v. Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

The minority population of the "parishes" (counties) surrounding the plant, in the mid-1970s, was 43% black. The workforce in the area was estimated at 39% black. In the mid-1970's, 14.8% of the plant's employees were black. The only reason the plant's workforce had even that many blacks was because Kaiser had begun an affirmative action hiring plan in 1969, under pressure from the federal government to increase its minority hiring. In spite of the company's efforts to increase the overall number of black employees at the plant, there remained a severe shortage of blacks among its skilled workers. Less than 2% of the craftsmen at the plant were black and the company simply could not find skilled black craftsmen who wanted to work at the plant.

The company was under pressure from the Office of Federal Contracts Compliance, to increase the number of black craftsmen or forego lucrative federal contracts.[97] In addition, both sides, management and labor, feared Title VII suits by black workers. The company and the union agreed to open up new opportunities for blacks to become craftsmen. They did this by establishing new eligibility criteria for enrollment in the job training programs for skilled trade positions. Formerly, there was a requirement of previous craft experience. In the new agreement, the on-the-job training programs were opened up to all workers; selection was based only on seniority. To ensure that blacks would be included in large numbers, the company and the union agreed that equal numbers of whites and blacks would enter the training programs. Thus, the most senior blacks and most senior whites were eligible to take part, on a 50-50 black-white basis. The affirmative action plan would continue until black craftsmen in the plan approximated the percentage of blacks in the local workforce (39%). A white worker who otherwise would have

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[97] *See Weber v. Kaiser Aluminum & Chem. Co.*, 563 F.2d 216, 218-19 and n.3 (5th Cir. 1977).

been eligible for the training program, but who was "bypassed" by blacks with less seniority, brought suit aleging a violation of his Title VII rights.

The district court agreed with the plaintiff, advancing two rationales for its decision: 1) "quotas" could never be imposed voluntarily by an employer, only a court had such power; 2) even if an employer could impose a "quota," a) the facts did not warrant it because the preferred (black) workers were not themselves identifiable victims of past discrimination and b) there was no proof of past discrimination by the employer. *See Weber v. Kaiser Aluminum & Chem. Co.*, 415 F.Supp. 761 (E.D.La.1976).

The Fifth Circuit affirmed, but only on the second ground advanced by the district court. The panel majority would allow voluntary affirmative action, but only on a specific showing of past discrimination. General societal discrimination was not enough, nor was past discrimination against blacks in the skilled trades enough. Nor would it suffice if other Kaiser plants had discriminated against blacks. It had to be shown that the Kaiser Gramercy plant itself had discriminated against blacks in the past. See *Weber v. Kaiser Aluminum & Chem. Co.*, 563 F.2d 216, 224-226 (5th Cir. 1977).

Judge Wisdom, in dissent, stated that the majority position would doom all voluntary affirmative action efforts because it would force an employer to prove or admit that it had engaged in past discrimination against black workers in order to justify preferential treatment for them. If a court found that an employer went too far with affirmative action, it could be sued by whites. If an employer did not go far enough, it could be sued by blacks. Judge Wisdom suggested that an employer be given a "zone of reasonableness" in voluntarily adopting an affirmative action plan to encourage such voluntary action.

"If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld." *Id.* at 230. Applying this standard, Judge Wisdom would have upheld Kaiser's affirmative action plan. Kaiser's Gramercy plant had "arguably" violated Title VII in light of the disparate workforce data and indications that some of Kaiser's training requirements were discriminatory and not job-related. The affirmative action plan was reasonable because 1) the plan was negotiated between the company and the union, 2) the plan was new and created new rights and expectations for whites and blacks alike, and 3) the plan allowed significant white participation.

The Supreme Court upheld the affirmative action plan. The Court did not adopt Judge Wisdom's proposed standard; instead it took an even broader position. Under Title VII, there exists an "area of discretion" for "the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *United Steel Workers v. Weber*, 443 U.S. 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979). The Court looked to the imbalance between the racial composition of the plant's craft workers (1.83% black) and of the surrounding area (39% black) and took judicial notice of blacks' traditional exclusion from crafts. *Id.* at 2725 and n.1. This was enough to justify voluntary affirmative action.

The Court next examined whether the challenged Kaiser plan was a permissible one. The Court did not lay down any standards, but upheld the plan before it for several reasons. The plan did not "unnecessarily trammel" the interests of white employees, because it did not cause any whites to be dismissed and did not absolutely bar whites from advancement. In addition the plan was temporary — it would end when the plant's percentage of skilled black craftsmen approximated the percentage of blacks in the workforce.

2. Weber and the Detroit Affirmative Action Plan

[7] Weber stands for the general proposition that voluntary affirmative action is proper if it is reasonable under all of the circumstances.[98] Further, the Court, in creating an "area of discretion" for an employer to conduct a voluntary affirmative program took a broad view. This is apparent from Mr. Justice Blackmun's concurring opinion which examines the Court's standard and contrasts it with the standard advanced In Judge Wisdom's dissent in the Fifth Circuit. Justice Blackmun explained that a traditionally segregated job category exists "when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within that category." *Id.* at 2732. He went on to note that under the Court's test, the individual employer need not have discriminated against blacks. So long as the requisite statistical disparity existed, that is enough. In addition, the Court's test allows an employer to redress past discrimination which is outside the scope of Title VII's effective coverage.

The plaintiffs in this case have taken the position adopted by the District Court in *Weber* — that "quotas" are so pernicious that only a court should be allowed to impose such relief and even then only in the narrowest of circumstances. The Supreme Court, however, rejected this view. It has chosen to give an employer extraordinarily broad leeway in remedying past discrimination via voluntary affirmative action. In fact, under *Weber*, a private employer may adopt an affirmative action plan even if a court could not force him to do so.

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[98] Judge Wisdom's opinion also stood for the general proposition that voluntary affirmative action is legal if it is reasonable. The specific standard which he advanced to test reasonableness, however, is different from the standard adopted by the Supreme Court.

This case is unlike *Weber*, where the employer was unwilling to admit past discrimination; the City of Detroit has presented extensive evidence of its own past misconduct. This evidence, outlined above, goes far beyond *Weber's* minimal requirements to justify an affirmative action program. Under *Weber*, voluntary affirmative action would be allowable on a showing of past exclusion of blacks from police departments[99] and a statistical disparity between blacks in the Department and blacks in the City of Detroit. It cannot be questioned that such a showing was made here.

It is indeed ironic that the plaintiffs have vehemently argued that the presentations of Police Chiefs Tannian and Hart to the Board of Police Commissioners were incomplete and misleading because it is improper to compare the percentage of black lieutenants with the percentage of blacks in the City of Detroit. The Supreme Court's comparison of the percentage of black

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[99] There have been many court cases finding discrimination by police departments against blacks. See *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *Mims v. Wilson*, 514 F.2d 106 (5th Cir. 1975); *Afro American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *Erie Human Relations Commission v. Tullio*, 493 F.2d 371 (3d Cir. 1974); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974), *Bridgeport Guardians, Inc. v. Members of Bridgeport Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *United States v. City of Buffalo*, 457 F.Supp. 612 (W.D.N.Y. 1978); *League of Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976); *Officers for Justice v. Civil Services Commission*, 371 F.Supp. 1328 (N.D.Cal. 1973).

In *Weber*, 99 S.Ct. at 2725 n.1, the Supreme Court took judicial notice of exclusion of blacks from crafts on racial grounds. This Court takes judicial notice of similar exclusion of blacks from police departments.

craftsmen at the Kaiser Gramercy plant with the local labor force was very similar to the Chiefs' comparison.[100]

[8] Plaintiffs, in a supplemental brief, argue that a significant difference between *Weber* and the instant case is that the affirmative action plan in *Weber* was voluntarily negotiated between the company and the union. That way, the union was able to protect the rights of the predominantly white workers it represented. In this case, the police unions have been fiercely opposed to affirmative action and with one exception,[101] have fought it bitterly in the courts and at the bargaining table.[102] It is true, as indicated above that Judge

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[100] The Supreme Court compared the percentage of black craft workers with the percentage of blacks in the general labor market in the two counties (parishes) surrounding the plant. The labor market was 39% black while the general population was 43% black. Chiefs Tannian and Hart compared the percentage of blacks in the Department with the percentage of blacks in the general population of Detroit. According to the 1970 census, 43.7% of the City of Detroit was black. Similarly,the 1970 census reported that 43.6% of the relevant male labor force in Detroit in 1970 was black (males in the work force, 18-34) with 12 or more years of school completed). The City of Detroit's planning department estimates that Detroit's black population has increased since then. There is no reason to think that the labor market has not increased correspondingly. As previously indicated, these figures are very close to defendants' expert testimony that in 1970 the relevant labor pool was 39.5% black. *See* section III, *supra*.

[101] The very first set of promotions in 1974 were discussed by the City and the police unions and approved by the Lieutenants and Sergeants Association. *See* n.5, *supra*.

[102] Plaintiffs argue that as a matter of state law, the City has unlawfully refused to bargain with the union about the affirmative action plan in promotions. It may be that the City is required to bargain out the affirmative action plan as part of the criteria for promotions. *See Detroit Police Officers Assoc. v. City of Detroit*, 61 Mich.App. 487, 233 N.W.2d 49 (1975). Whether or not the City bargained in good faith concerning affirmative action is of no relevance to these proceedings. That is strictly a subject of state law and is subject to proceedings in state court. Further, the only

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Wisdom, in his dissent in the Court of Appeals case, cited the negotiated aspect of the affirmative action plan as a significant consideration. However, the Supreme Court specifically avoided such a limitation in its opinion. This omission is significant and nullifies whatever force there may have been to plaintiffs' argument. In any event, this court can see no reason why an affirmative action plan should rise or fall on whether a union agrees to it. The fact that a union agrees to such a plan is a factor demonstrating that the plan is reasonable, but a union's obstinate refusal to agree to affirmative action should not be deemed significant.

Plaintiffs urge that unlike the affirmative action plan in *Weber* which created new opportunities for both whites and blacks, the City's affirmative action plan destroyed the hopes and expectations of white officers under an established merit system, and thus, was unreasonable.

This distinction is one which the plaintiffs have drawn throughout this litigation. Where an affirmative action program exists at the hiring level, its impact is diffused because it is not clear that any given minority applicant was hired instead of any given white applicant. Where an affirmative action program exists at the promotions level, however, the opposite is true. White workers can specifically see that they were passed over in favor of minorities. The impact on identifiable white workers is thus very direct.

This argument has found favor in the Second Circuit. As a result, that court has been hostile to promotional "quotas". *See Kirkland v. New York Dept. of Correctional Services*, 520 F.2d

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evidence in the record of refusal to bargain over affirmative action related to discussions between the union and Chief Tannian in 1974. It appears from the *DPOA* case, *supra* that it was unsettled in 1974 whether the City was required to bargain about such matters.

420, *reh. en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm.*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). *See also White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977). *Cf. Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977) (quota in lay-offs would have required white workers to lose their jobs instead of blacks who had less seniority).

Other courts, however, have not taken a jaundiced view to affirmative action in promotions. *See EEOC v. A.T. & T. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.) *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1194 (5th Cir. 1976); *United States v. N. L. Industries*, 479 F.2d 354, 377 (8th Cir. 1973). In *Stamps v. Detroit Edison*, 365 F.Supp. 87, 122-23 (E.D.Mich. 1973) this Court ordered Detroit Edison to hire at a ratio of three blacks for every two whites and to promote at a ratio of one black for every white. The Court of Appeals for the Sixth Circuit affirmed those orders. *See E.E.O.C v. Detroit Edison*, 515 F.2d 301, 317 (6th Cir. 1975).

[9] As a threshold matter. this Court does not find the plaintiffs' authorities persuasive. In this Court's view, the difference between the impact on whites of a promotional quota as opposed to a hiring quota is not so great so as to justify a harsher standard of review. All affirmative action programs have an adverse effect on whites and to one extent or another upset settled expectations. Where past discrimination against blacks has been shown, courts have reasoned that making up for past discrimination justifies upsetting the expectations of white workers. *See Franks v. Bowman Trans. Co.*, 424 U.S. 747,

772-78, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *EEOC v. A.T. & T. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978). This reasoning should be equally applicable to affirmative action at the hiring level as well as the promotional level. *See Kirkland v. New York Dept. of Correctional Services*, 531 F.2d 5 (2d Cir. 1975) (Mansfield, J., dissenting from denial of rehearing en banc).

The facts of *Weber* support this position and undermine the view of the Second Circuit. *Weber*, in reality, involved a promotional quota. The plaintiff, Brian Weber, was passed over for entry into a job training program which would lead to a higher-paying job as a skilled craft worker. He and other white workers who had greater seniority than many of the blacks accepted under the affirmative action plan were identifiable "victims" of the affirmative action plan. The Supreme Court did not discuss this fact; instead it pointed out that no white workers lost their job and that whites as well as blacks were allowed access to the craft training program.

[10] Plaintiffs argue that the affirmative action program in *Weber* was newly created and offered new advancement opportunities to both whites and blacks. This feature of the program was cited by Judge Wisdom in his dissenting opinion in the Fifth Circuit. The Supreme Court, however, failed to mention this fact in its opinion when it assessed the reasonableness of the program. Further, the fact that the plan created new expectations instead of upsetting settled expectations does not significantly alter the effect on white workers. The white workers in *Weber* were still being identifiably passed over in favor of less-senior black workers. That is similar to what has occurred to the white police officers in this case.

The issue of relative qualifications was not present in *Weber* because both the white and black workers involved were unskilled. However, that issue is present in this case and has been the subject of fierce dispute. It is clear to this Court, as

indicated above, that the black officers promoted under the affirmative action plan were equally qualified with the white officers. Moreover, even if the white officers were slightly more qualified than the black officers, affirmative action promotions would still be permissible given the broad deference *Weber* gives to employers. This deference to the employer's judgment is well placed, given the slippery nature of any judgment on relative qualifications.[103]

In sum, for Title VII purposes this case is indistinguishable from *Weber*. The City's affirmative action plan was, like the plan in *Weber*, a "temporary measure ... not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance" in the supervisory ranks of the Department.[104] The additional factors cited in *Weber* are also met here. No white police officer lost his job and whites were promoted along with blacks. *Weber* compels this Court to uphold the City's affirmative action plan under Title VII.[105] *See also Maehren v. City of Seattle*, 92 Wash.2d 480, 599 P.2d 1255 (1979).

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[103] When a Court imposes an affirmative action plan on an employer, there exists the theoretical danger that the employer will be forced to hire or promote unqualified persons. In the case of a voluntary affirmative action plan, no such danger exists since an employer will presumably be careful to hire or promote only qualified workers. That was true in this case, where the Board of Police Commissioners was careful to promote only blacks who had passed the written promotional examination.

[104] It is true that the Board of Police Commissioners has yet to set a date for when the affirmative action program will end. However, it is clear that the Program is slated to end at some point. The reasonableness of the termination point is an issue discussed at the end of this opinion.

[105] As previously indicated, Title VII should be construed coextensively with § 1981 in this case. Thus, the plan must be held lawful under § 1981 as well. Any other holding on the § 1981 issue would allow *Weber* to be circumvented every time by simply filing suit under that statute instead of Title VII.

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3. The City's Past Violation of Title VII

[11] Although Title VII was originally enacted in 1964 as part of the Civil Rights Act, it was not extended to public entities such as the City of Detroit until 1972. Plaintiffs argue from this that if the City of Detroit did use unvalidated, discriminatory tests prior to 1972,[106] that should be irrevelant so far as Title VII is concerned.[107] Additionally, plaintiffs argue that since the City was acting in good faith, through Commander Caretti, to improve the hiring and promotional models, it could not be liable under Title VII to black plaintiffs for any disparate impact on blacks from these tests for the years 1972-1973.

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Plaintiffs make the interesting argument that *Weber* does not apply at all in a case such as this which arose in the public sector. The reason is that Title VII was not extended to public sector employers until 1972. Plaintiffs argue that Congress extended Title VII solely on the basis of its power to legislate under the Fourteenth Amendment and that thus Title VII as applied in the public sector should be construed coextensively with Title VI and the Fourteenth Amendment.

This Court fails to see the significance of plaintiffs' argument. Title VII as applied to the public sector in 1972 is the same statute which the Court interpreted in *Weber* as not barring voluntary affirmative action. And, unlike the uncertain 1964 legislative history reviewed by the Court in *Weber*, the 1972 legislative history clearly demonstrates Congress' approval of race — conscious remedies for past discrimination. *See Univ. of Calif. Regents v. Bakke*, 438 U.S. 265, 353-54 n. 28, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ.).

[106] As this Court has already noted, Title VII imposes much more exacting requirements on an employer than the fourteenth amendment. If a hiring or promotional test or other selection device acts to screen out disproportionate numbers of members of a protected class, then Title VII requires that device to be shown to be job related. Thus one does not need to show intent to discriminate to establish liability under Title VII, one need only show disparate impact, i.e. that blacks fail more often than

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[12] The record is clear that the City used unvalidated and discriminatory hiring — and promotional — tests until 1974. It is equally clear that since Title VII was made applicable to the City in March of 1972, the City was guilty of discriminating against blacks under Title VII from that date until 1974.[108]

Plaintiffs dispute the evidence of disparity and argue that if anything, blacks were preferred in hiring in 1972 and 1973.

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whites. The employer then has the burden of proving that the job selection device he is using is job-related. *See e.g. Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849,28 L.Ed.2d 158 (1971).

[107] Plaintiffs also argue that the City did not violate any § 1981 rights of black employees before 1972 because § 1981 requires proof of intent to discriminate, like § 1983 and the constitution. Thus, according to plaintiffs, any § 1981 rights of Black Plaintiffs were coextensive with their constitutional claim. This Court has already indicated that § 1981 and Title VII should be read coextensively whenever possible. However, there is much authority that § 1981, like § 1983 requires proof of intent to discriminate. *See e.g. Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978). *Contra Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). Since this Court has determined that the City's conduct through at least 1967-68 showed intentional discrimination against blacks, it is unnecessary to enter the controversy. This Court will assume that § 1981 requires proof of intent to discriminate.

[108] Plaintiffs argue that Title VII, as applied to municipalities, incorporates the intent-to-discriminate requirement of the Constitution because Congress had no authority to impose Title VII's disparate-impact standard on the states. This Court rejects this argument for the reasons given in *Blake v. City of Los Angeles*, 595 F.2d 1367, 1372-74 (9th Cir. 1979). *Accord Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979), *petition for cert. filed* 47 U.S. L.W. — (1979); *United States v. City of Chicago*, 573 F.2d 416, 423-24 (7th Cir. 1978).

This Court has already discussed this contention. This Court credits Mr. Fechter's analysis finding adverse impact against blacks in 1972-73 and finds it consistent with the City's use of aptitude tests which have historically discriminated against blacks.

The plaintiffs' good faith argument is interesting, but it is established that good faith is not a defense to Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The fact that the City was earnestly working to obtain validated, non-discriminatory hiring tests throughout the early 1970s is no solace to black applicants who were screened out by the unvalidated, discriminatory temporary tests the Department used until the fall of 1973. The plaintiffs' good-faith, temporary business necessity argument, based on *Blake v. City of Los Angeles*, 435 F.Supp. 55 (C.D. Cal. 1977) is unavailing for the reasons given by Judge Hufstedler in her opinion for the Ninth Circuit reversing *Blake*. *See* 595 F.2d 1367, 1375-82 (9th Cir. 1979). Thus, *Weber* aside, the affirmative action plan is justifiable to remedy clear violations of Title VII which continued into 1972 and 1973. The effect of the Department's promotional model was to perpetuate this and other past discrimination against blacks. Under these circumstances, the Department had a clear duty to remedy the discrimination.[109]

C. The Constitutional Claim

On its facts, *Weber* dealt only with a private business. This case deals with a public employer which, unlike a private employer, is subject to the command of the 14th Amendment's equal protection clause. Accordingly, this

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[109] This alone would appear to satisfy the test advanced by the majority opinion in the Fifth Circuit's *Weber* decision.

Court must assess whether the City's affirmative action plan passes constitutional muster.[110]

[13] When a state has been guilty of racial discrimination, the Constitution commands that the discrimination and any effects from it be corrected. A state has an affirmative duty to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed2d 709 (1965).* An illustrative area where this affirmative duty comes into play is school desegregation. In *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) and *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), the Supreme Court spoke strongly of the affirmative duty which school boards have to dismantle school systems which were segregated in 1954 when *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954) was decided. The Court ruled that the existence of intentionally segregated schools in 1954 creates a continuing duty on a school board to eradicate the effects of that system and that the continued existence of segregated schools establishes a prima facie case that the school board has failed in carrying out that duty. *See Columbus supra*, 99 S.Ct. at 2947-49; *Dayton, supra*, 99 S.Ct. at 2979.

Massive litigation and controversial court orders have resulted because school boards have chosen to ignore their duty and wait until a court forced them to act. Yet it is clear that voluntary compliance has always been preferred. The public agency involved has the "primary responsibility" for undoing the effects of past discrimination and courts should intervene only when the public agency shirks its responsibility. *See Milliken v. Bradley*, 433 U.S. 267, 281, 97 S.Ct. 2749, 53

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[110] As previously indicated, this also controls the Title VI and § 1983 claims.

L.Ed.2d 745 (1977); *Swann v. Charlotte-Mechlenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 29 L.Ed.2d 582 (1971).

The validity of race-conscious remedies for past discrimination was a central theme of *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The University of California at Davis Medical School operated a special admissions program which set aside a fixed number of places for minority students. However, the Medical School, unlike the defendants here, did not attempt to justify the program as a remedy for past unlawful discrimination and was not itself guilty of past discrimination. Four Justices (in an opinion authored by Justice Stevens) expressed no view on the propriety of a remedial affirmative action program, but found the University's program violative of Title VI. Four other Justices (in an opinion authored by Justice Brennan) would have sustained the program as an appropriate response to general societal discrimination against minorities. Mr. Justice Powell rejected the societal discrimination justification, but would have allowed the use of race as a factor in admissions in order to achieve diversity in a student body. According to Justice Powell, the program was invalid because it set up a rigid quota for minorities and insulated them from overall consideration with whites.

[14] *Bakke* stands for the proposition that general past societal discrimination against blacks or other minorities, by itself, will not justify race-conscious numerical preferences, at least in professional school admissions. The opinion of Mr. Justice Stevens expressly declined to comment on the use of race in a remedial affirmative action program designed to remedy more specific past discrimination. The opinion of Mr. Justice Brennan thought that past societal discrimination, by itself, did justify numerical racial preferences; Justice Brennan would have upheld numerical racial preferences as a

remedy for past discrimination, whether judicially imposed or voluntarily adopted. The "swing" opinion of Mr. Justice Powell conceded that the state has "a ligitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307, 98 S.Ct. at 2757. Justice Powell distinguished the school desegregation cases as instances where wrongs were "worked by specific instances of racial discrimination," a "far more focused" goal than the "amorphous concept" of "remedying the effects of 'societal discrimination.' " *id.* He would approve affirmative action on "judicial, legislative or administrative findings of constitutional or statutory violations." *id.*

The opinion of Justices Brennan, White, Marshall and Blackmun summarized the meaning of the Court's opinion in *Bakke*:

> "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area."[111] 438 U.S. at 325, 98 S.Ct. at 2766.

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[111] Defendants properly point out that the opinion of Justice Stevens criticizes, 438 U.S. at 408 n. 1, 98 S.Ct. 2833, but Justice Powell does not disavow this statement.

Post-Bakke courts have realized that Bakke does not affect race-conscious action to remedy past discrimination. *See Maehren v. City of Seattle*, 92 Wash.2d 480, 599 P.2d 125 (1979); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 588 F.2d 235, 239 (8th Cir. 1978), *cert. denied*, 443 U.S. 904, 99 S.Ct. 3096, 61 L.Ed. 872 (1979); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979); *Minnick v. Calif. Dept. of Corrections*, 95 Cal.App.3d 506, 157 Cal.Rptr. 260 (1st App.Dist.) (1979).

The plaintiffs have advanced a number of arguments as to why the affirmative action plan instituted by the Police Department is impermissible under the fourteenth amendment, as construed in *Bakke*. Plaintiffs correctly note that racial classifications such as the one here must withstand "strict scrutiny" under the Constitution. It is clear from *Bakke* that undoing the present effects of past discrimination, under some circumstances, withstands strict Constitutional scrutiny. The question is whether this case presents such circumstances.

1. The Board of Police Commissioners' Findings of Past Discrimination

[15] It is unclear from Mr. Justice Powell's opinion what administrative body would be appropriate to find past discrimination. In *Bakke*, the question never arose because no defense of past discrimination was raised. However, Mr. Justice Powell favorably cited, *inter alia*, *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Contractors Assoc. of Eastern Pa. v. Sec'y of Labor*, 441 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971). In *United Jewish Organizations, supra*, the Department of Justice objected under §5 of the Voting Rights Act to the drawing of certain voting district boundaries because they diluted black voting strength. The boundaries were redrawn, but the result was dilution of the voting strength of orthodox Jews. The Court sustained the redrawn boundaries. In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1979), the relevant agency was the Department of Health, Education and Welfare which had promulgated regulations requiring remedial instruction to children of foreign ancestry who spoke no English. In

McDaniel v. Barressi, supra, a school board attempted to voluntarily disestablish its dual school system, albeit under pressure from the Department of Health, Education and Welfare. The Georgia Supreme Court struck down the board's race-conscious assigning of students. The United States Supreme Court reversed, upholding the board's voluntary efforts.

In *Contractor's Ass'n, supra,* the Third Circuit upheld the Secretary of Labor's establishment pursuant to executive order 11246, of goals for minority hiring by contractors in the Philadelphia area. The Secretary had determined that there was a need for such a remedy because of the severe underrepresentation of blacks in the craft trades in the Philadelphia area. The Secretary ascribed this underrepresentation to exclusionary union practices.[112]

It is clear from the above authorities that Justice Powell's concern was directed to the reliability of the finding of past discrimination and to the nature of the finding of past discrimination. In each of the above cases there was good reason to credit the findings of specific past discrimination made by each administrative body in question.

Plaintiffs argue that Chiefs Tannian and Hart misrepresented to the Board of Police Commissioners the need for the 50/50 black-white promotion ration as being mandated by the Law Enforcement Assistance Administration (LEAA); that the Chiefs withheld the existence of the 50/50 ratio from the LEAA and that the Board acted improperly in refusing to investigate further, call additional witnesses and take testimony under oath.

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[112] Other Courts have upheld preferential hiring under the executive order, *e.g. Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cewrt. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972).

This court sees not basis to these claims. The LEAA guidelines distinguish between impermissible racial quotas to redress mere racial imbalance and such quotas to offset past discrimination. Indeed, 28 C.F.R. §42.203(i)(L) provides that where a "recipient has previously discriminated against persons on the ground of race [or] color . . ., the recipient must take affirmative action to overcome the effects of prior discrimination." The Equal Employment Opportunity Coordinating Council has adopted a policy statement to the same effect. *See* 41 Fed.Reg. 38814 (Sept. 13, 1976). In addition, the Equal Employment Opportunity Commission has issued broad guidelines which strongly encourage voluntary affirmative action pursuant to self-assessment.[113]

It is true that Chiefs Tannian and Hart urged the Board to adopt affirmative action to avoid the possible loss of federal funds, but at no time did they represent that a fund cut-off was imminent. Further, contrary to plaintiff's claims, the testimony of government analyst Jacqueline DeYoung of the

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[113] *See* 29 C.F.R. §1608. Under these guidelines, employers are encouraged to conduct a self-assessment and take voluntary affirmative action, including goals and timetables. Such action may be taken where an employer reasonably believes it necessary to correct the effects of past discrimination or past disparate treatment of minorities. An employer does not have to openly admit past discrimination, does not have to establish a past title VII violation and may take affirmative action without regard for affirmative defenses (such as statutes of limitations) which might bar relief from a court.

While conceding that ordinarily EEOC guidelines are "entitled to great deference," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), plaintiffs argue that these guidelines are not, basically because they were hastily brought out in response to the Fifth Circuits decision in *Weber*. *See General Electric v. Gilbert*, 429 U.S. 125, 142, 97, S.CT. 401, 50 L.Ed.2d 343 (1976). Whatever force there may have been to this argument is gone after the Supreme Court's decision in *Weber*.

Department's special projects section demonstrates that the LEAA knew of the affirmative action program and how it functioned.

It is clear that the Board of Police Commissioners was well aware of enough relevant facts to make the findings that it made. The statistical evidence of disparity was before the Board — evidence that, contrary to plaintiff's claim, was highly probative of past discrimination. Further, the issues were fully aired at public hearings. The sad history of the Detroit Police Department which is outlined in this opinion is not a secret. The Board of Police Commissioners, whose members are all residents of Detroit, was well aware of the Department's past and of the Department's relationship with the black community. One need only examine the Report of the National Advisory Commission on Civil Disorders and the Task Force on the Police Report of the President's Commission on Law Enforcement and Administration of Justice to realize that intentional discrimination in the hiring of police officers and within police departments was a problem nationwide and in Detroit in 1967-1968. There was good reason for the Board to credit Chiefs Tannian and Hart's testimony that discriminatory effects were still present. The Board of Police Commissioners' finding that it had an affirmative duty to remedy years of pervasive discrimination against blacks was not only reasonable, but long overdue.[114]

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[114] Plaintiffs argue that the Board of Police Commissioner's actions were premised on a showing of past "de facto" discrimination which is insufficient to establish a constitutional violation. The phrase "de facto" as opposed to "de jure" is not significant. Commissioner Littlejohn believed that past discrimination against blacks had been intentional and the Board of Police Commissioner's affirmative action resolutions spoke of undoing constitutional violations.

[16] Because the Supreme Court has spoken so strongly of the need for voluntary efforts to eliminate the blight of past discrimination, it is this Court's view that *Weber* should apply with full force to employers in the public sector. In other words, a voluntary affirmative action plan which passes muster under *Weber* should also pass muster under the Constitution. *Weber's* factors of racial imbalance and traditionally segregated job categories provide a sound basis for an employer to act and for a reviewing Court to judge the necessity of affirmative action. A public employer which contemplates voluntary affirmative action faces the same dilemma which a private employer faced before *Weber*: risk of suit by one side or the other no matter what it does. The same zone of reasonableness should apply. Moreover, as the school desegregation cases demonstrate, lingering effects of past intentional discrimination can haunt a public employer many years after the intentional discrimination has ended. A finding by a public employer that racial imbalance exists in a traditionally segregated job category should be equated with a finding that the employer had failed in his duty ot remedy the present effects of past discrimination. This implicit or explicit finding of past discrimination would have the directness and reliability which Mr. Justice Powell, in *Bakke*, referred to when he spoke of "disabling effects of identified discrimination." 438 U.S. at 307, 98 S.Ct. at 2757 – 58 and "judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* which in his eyes would justify a preference.

[17] Whether this view is accepted or not, this Court believes, on the facts of this case, that the Board of Police Commissioners' findings were adequate to sustain some form of affirmative action relief. The correctness of their conclusion is supported by the record in this case, which demonstrates beyond doubt that affirmative action was required to undo the present effects of years of systemic discrimination.

2. Intentional Past Discrimination

[18] Plaintiffs argue that at worst the record shows some segregated squad cars and discriminatory job assignments up through the early 1960s, but that no intentional discrimination existed in hiring or promotions.[115] At worst plaintiffs argue, blacks were kept out of the Department by facially neutral I.Q. tests which blacks failed more often than whites.

The plaintiffs draw this distinction because under the Supreme Court's decision in *Washington v. Davis*, 426, U.S. 299, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), proof of discriminatory intent is required to establish a violation of the equal protection clause. Plaintiffs argue that there is no proof in the record from which the Board of Police Commissioners or anyone else could have concluded that the City intentionally discriminated against blacks. Plaintiffs conclude that since at worse the City used facially neutral tests which blacks happened to fail a lot, the City was never guilty of violating the

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[115] Plaintiffs argue that the lieutenant's promotional system was and is a bona-fide merit system, protected under §703(h) of Title VII. They argue that just as seniority systems which are bona-fide are protected by §703, even if they perpetuate the effects of past discrimination, so should a bona-fide merit system be protected.

In *Int's Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the Court did rule that bona-fide seniority systems are immune from attack under Title VII. That ruling, however, applied only to seniority systems and not to anything else. In fact, the Court in *Teamsters*, noted the anomaly of its holding, but felt compelled to so rule by the express language of §703(h). *See* 431 U.S. at 349 – 50, 97 S.Ct. 1843.

It is clear that promotional or merit systems which perpetuate past discrimination are violations of Title VII. *See United States v. Trucking Employees, Inc.*, 182 U.S.App.D.C. 315, 321, 561 F.2d 313, 319 (D.C. Cir. 1977); *Chavez v. Temple High School Dist. No. 213*, 565 F.2d 1087, 1093 n. 8 (9th Cir. 1977).

Constitution regarding black officers and thus was never under a duty to remedy its past discrimination.

Plaintiffs overstate the standard of *Washington v. Davis, supra*. As the Court stated in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977), "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." In this case, the evidence shows intentional discrimination against blacks through at least 1967 – 1968, when the Detroit Riot caused people to sit up and take notice.

First, the Department used subjective criteria in hiring such as oral boards and background checks which excluded large numbers of blacks. The record is clear that this subjective decisionmaking operated to deliberately exclude large numbers of blacks.

Second, the Department used I.Q. tests for years on end which it knew had nothing to do with whether an applicant would make a good police officer but which screened out large numbers of black applicants. Plaintiffs acknowledge that this may have occurred, but argue that use of neutral tests which blacks happen to fail disproportionately is not intentional discrimination under *Washington v. Davis, supra*. This Court disagrees. It is established in the Sixth Circuit that one intends the natural and foreseeable consequences of one's actions and where the natural and foreseeable results are discriminatory, a presumption of discriminatory intent arises. *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975), *reaffirmed in NAACP v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1977). *Accord Arthur v. Nyquist*, 573 F.2d 134, 142 – 43 (2d Cir.), *cert. denied*, 439 U.S. 860, 99 S.Ct. 179, 58

L.Ed.2d 169 (1978); *United States v. School Dist. of Omaha*, 565 F.2d 127 (8th Cir.) (en banc), *cert. denied*, 434 U.S. 1065, 98 S.Ct. 1240, 55 L.Ed.2d 765 (1977).

In the recent *Columbus* and *Dayton* cases, the Supreme Court did not approve the above test insofar as it created a presumption of intentional discrimination. *Dayton, supra* 99 S.Ct. at 2978 n. 9. However, the Court made it clear that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose . . ." *id.* Further, the Court allowed the finder of fact to draw an inference of segregative intent from acts which are foreseeably discriminatory, *Columbus, supra*, 99 S.Ct. at 2950. Such an inference is inescapable here where the Department continued its I.Q. tests for years and was content to hire minuscule numbers of black officers. Further, the evidence in the record of blatantly discriminatory treatment of black citizens — winked at by the Department — as well as blatant discrimination against black officers in the Department provides additional compelling evidence that the Department was deliberately keeping blacks out. This factual situation distinguishes *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir.) *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977), relied on by plaintiffs.

Finally, there is the compelling statistical evidence. The Supreme Court had ruled that "significant proof" of intentional discrimination can be found in statistical comparisons of workforce and population data. *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 337 n. 17, 339–40, n. 20, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). This Court has outlined the statistically significant employment data in this case. It well demonstrates the severity of the discrimination undergone by blacks. *See also Maehren v. City of Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (1979).

3. Summary

In sum, this Court believes that *Weber's* allowance of voluntary affirmative action by private employers subject to Title VII should be extended to public employers subject to Title VII and the Constitution. If anything, the policy arguments are more compelling to allow such affirmative action by public employers than private ones.

There were clear findings by a duly constituted public body, the Board of Police Commissioners, that affirmative action was needed to offset the present effects of past discrimination. The evidence in the record overwhelmingly supports these findings.

4. Was the City's Affirmative Action Plan Reasonable?

[19] The *Weber* analysis applied to the question of whether a remedial program of racial preference is warranted should also be applied to determine the reasonableness of the program instituted. A direct comparison of *Weber's* facts with the facts of this case, *supra*, demonstrates the reasonableness of the City's program here.

In addition to the standards set out in *Weber*, reasonableness standards are provided by Justice Brennan's opinion in *Bakke*. "... whether the ... program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives ..." 438 U.S. at 373–74, 98 S.Ct. at 2791.

It is true that identified whites were passed over by the affirmative action plan. That, however, is not "stigmatizing" in the sense that Justice Brennan used that word in *Bakke*. *See* 438 U.S. at 374–76, 98 S.Ct. 2733. The white officers were not stamped inferior; rather the black officers were compensated for the past discrimination they had undergone.

The plaintiffs make many arguments for why the City's affirmative action plan was unreasonable. A key theme which runs through all of the plaintiffs' arguments is that the City's Affirmative Action Plan does not help identified black victims of past discrimination, but merely helps blacks who happened to be on the promotional eligibility lists.

[20] As Justice Brennan's opinion, in *Bakke* noted, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) and *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) make clear that preferential relief for members of a class which has been subject to past discrimination can be awarded on a group basis in the expectation that members of the preferred group were likely to have been subject to discrimination. *See* 438 U.S. at 362–69, 98 S.Ct. 2733. Testimony in the record from black officers who entered the case as intervening defendants established that this likelihood was true in many cases.[116]

But the rationale is broader than that. The societal interest in eliminating employment discrimination is "sufficient in itselt to justify relief directed at classes rather than individual victims of discrimination . . ." *EEOC v. A. T. & T. Co.*, 556 F.2d 167, 175–77 (3d Cir. 1977), *cert denied*, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978). Congress has taken a similar view in 42 U.S.C. § 6705(f)(2) which allocates 10% of certain federal projects' funds to minority business enterprises without regard to whether the beneficiaries had themselves suffered discrimination. The courts have upheld this provision. *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978), *cert. granted* 444 U.S. 960, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979); *Ohio Contractors Assoc. v. Economic Development Admin.*, 580 F.2d 213 (6th Cir. 1978). The EEOC guidelines on affirmative action specifically state that voluntary affirmative action can benefit

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[116] See n. 68, *supra*, and accompanying text.

persons not shown to have been victimized by past discrimination. *See* 29 C.F.R. § 1608.4(c). The Supreme Court 's opinion in *Weber* is only the latest confirmation of this view. None of the black workers assisted by the craft-training preference could be said to be identifiable victims of past discrimination. *See also Maehren v. City of Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (1979).

Unlike *Mitchell v. Mid-Continental Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *cert denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 396 (1979), the underlying discrimination in this case cannot be said to be fully remedied where the most recent department figures show a city whose population is over 50% black, 21% of the lieutenants are black and almost 40% of the police officers are black. Moreover, in this case there has been a showing of harsh, intentional past discrimination.

Plaintiffs tread heavily on the notion that the affirmative action plan was unreasonable because it isolated blacks from competing with whites for promotions, just as the Davis Medical School's quota did. *See* 438 U.S. at 319 – 20, 98 S.Ct. 2733 (opinion of Powell, J). This argument ignores the specific, remedial nature of the City's racial preference. Unlike the general societal discrimination addressed in *Bakke*, the past discrimination in this case was direct and still had ongoing effects. The City's affirmative action program in this case no more isolates whites and blacks from competition than the affirmative action program in *Weber* or the program ordered by this Court in *Stamps v. Detroit Edison*, 365 F.Supp. 87 (E.D.Mich.1973).

On balance, the 50/50 ratio is reasonable. It allows large numbers of white officers to be promoted as well as needed black officers. The officers are equally qualified. Race-conscious promotions help to remedy present effects of past

discrimination and also ensure that the City's operational need for black officers is met.[117] The affirmative action program was necessary to ensure the rapid eradication of past discriminatory effects; nothing less than race-conscious promotions could do this.

D. State Law Claims

[21] Plaintiffs assert that their rights under the Michigan Fair Employment Practices Act, M.C.L.A. § 423.301 *et seq.*, MSA. § 17.458 (301) *et seq.*, the Elliot-Larson Civil Rights Act, M.C.L.A. § 37.2201 *et seq.*, M.S.A. § 3.548(201) *et seq.* and Article 1, Section 2 of the Michigan Constitution were violated.

Each of these Acts prohibit racial discrimination much as Title VII does. State judges interpreting these state provisions look to federal case law for guidance. *See e.g., Civil Rights Comm v. Chrysler,* 80 Mich.App. 368, 375, n. 4, 263 N.W.2d 376 (1977). There is no reason to believe that the Michigan Courts would not follow the Supreme Court's reasoning in *Weber* in interpreting their own law.

This conclusion is reinforced by the Michigan Civil Rights Act of 1977, M.C.L.A. § 37.2210, which permits a "plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to . . . race . . ." if filed with the Michigan Civil Rights Commission. Thus, Michigan statutory law goes beyond the federal statutes in favor of voluntary remedial measures. The City of Detroit's affirmative action plan was initiated three years before this statute was enacted. However, after the statute's passage, the Department received a filing dispensation from the Michigan Civil Rights Commission.

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[117] *See* section VII, *infra.*

[22] *Rand v. Civil Service Comm.*, 71 Mich.App. 581, 248, N.W.2d 624 (1976), invalidating preferential promotions, is distinguishable because there was no finding of discrimination in that case which would authorize the Department of Civil Service to disregard the results of its own test as it did. In this case, findings of past discrimination were made and the record supports them. There is no reason to believe that the Michigan Courts would reach a different result on these facts. Further, because the Board of Police Commissioners was under an affirmative duty under the U.S. Constitution to eradicate the effects of past discrimination, even a state law forbidding voluntary affirmative action could not stand in the way. *See McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971).

Plaintiffs also claim that the City refused to bargain over promotional criteria. There is no evidence of this in the record.[118] The affirmative action promotions were made from July 1974 to July 1977 and were made pursuant to the provisions of Chapter 11, section 7-1114 of the Detroit City Chapter. As required by that provision, each time that the Chief of Police recommended that affirmative action promotions be done out of rank order, he submitted "written reasons" to the Board in the form of statistical information concerning Detroit's hiring and promotion practices.

[23] Plaintiffs finally raise a due process question. The Michigan state cases concerning due process *e. g. Casad v. City of Jackson*, 79 Mich.App. 577, 263 N.W.2d 19 (1977) have looked to state law to see whether a property right has been created. This is the same approach that the federal cases take. *See e. g. Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). However it does not appear that public employment is a property right under Michigan state law. In

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[118] *See* n. 102, *supra*.

this case, the City fully complied with the above-cited provisions of the City Charter which specifically allow the Board to promote candidates out of order. Plaintiffs point to no other source of state law for their "property right."

[24] Plaintiffs do claim that the Board of Police Commissioners violated the City Charter by denying white officers their right to appeal a promotion if it was based on a protest to the affirmative action plan. There is nothing to this claim. The purpose of individual appeals is to hear individual grievances. The white officers who were bypassed by affirmative action were complaining about Board Policy, not an injustice unique to them as individuals. Policy-making questions were handled by the Board at public meetings. That is where white officers could have made their case. It was unquestionably reasonable for the Board to dismiss summarily all appeals based on protests to the affirmative action plan.

VII. THE CITY'S OPERATIONAL NEEDS DEFENSE

[25] The City defendants argue as an independent justification for the promotion of black officers to the rank of lieutenant that effective law enforcement required that the Police Department at all ranks roughly reflect the population which it serves. They argue that the affirmative action program has 1) helped the police solve crime by fostering citizen support for the department, 2) improved the safety of police officers, 3) reduced riots, brutality, citizen complaints and demonstrations, 4) fostered equal treatment of citizens, 5) provided role models for young black officers, and 6) helped to accomplish necessary police duties such as undercover work or crowd control in black neighborhoods.

Plaintiffs argue that this defense stereotypes white lieutenants as being unable to effectively supervise black

officers or to relate to black citizens and that there is no way to correlate crime reduction to the affirmative action program. The plaintiffs further argue that any need for black officers in undercover work in the black community is fully met by black patrolmen who currently constitute 40% of the force and that no similar need exists for black lieutenants. So far as the plaintiffs are concerned, the City's argument is simply that whites need to be policed by whites, and blacks by blacks, and that the City thus regards race as a bona fide occupational qualification.

For years, courts have heard arguments that an employer should not have to hire blacks because the employer's customers did not like blacks. For years the courts have rejected such "customer preference" arguments. Yet, the City's operational needs defense sounds suspiciously like the discredited "customer preference" claim. Plaintiffs make no bones about their view that this is exactly what the City's argument amounts to. This Court disagrees.

The City's operational needs defense cannot be separated from the historical context in which it arose. In an ideal world there is no question that the operational needs defense would be untenable. However, we do not live in an ideal world, and the history of race relations in the City of Detroit is far from ideal. The history of the relationship between the Detroit Police Department and the black community is especially sad. In part II of this opinion, this Court has outlined many of the Department's practices vis-a-vis its own black officers. Unfortunately, the record reveals that the Department's attitude toward the black community was no better than its attitude toward its black officers.

A. The Black Community and Racial Discrimination by the Police Department

There is extensive evidence in the record which shows that the Police Department and the black community were at each

other's throats at least until the early 1970's. A phrase which was constantly used at trial was that the Police Department was regarded as an "occupation army" in the black community and was treated as such. Precinct stations in the black community looked like armed fortresses; they were shot at by passing cars of black youths. Officers were afraid to venture into the community for fear of being harassed or worse.

This sad state of affairs had many causes. The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe. Some of the testimony of Mr. Arthur Johnson before the Civil Rights Commission in 1960, previously quoted in this opinion,[119] vividly portrays the attitudes and practices of the Department — practices that Mr. Johnson testified were such that there wasn't a black citizen in the City of Detroit who had not been subject to them.

Witness after witness at trial testified that disciminatory police practices were common. Inspector Harold Johnson testified that officers would often stop black motorists for traffic offenses, search the car, take the seats of the car out, and then leave the seats on the street when they were finished. Deputy Chief of Police Reginald Turner, who commanded the tactical mobile unit starting in 1974, corroborated this testimony. He noted that disproportionately large numbers of black citizens were injured as a result of traffic stops. Chief Hart testified that "[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; its a matter of record." Deputy Chief Bannon testified that informal police rules in the forties and fifties were that "all blacks west of Woodward

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[119] *See* section IIA5, *supra*.

Avenue after sundown would be investigated unless they were known to the police officer." This "pattern of systematic discrimination" continued against blacks in individual officer-on-citizen contacts.

Empirical proof of the ongoing crisis in relations between the Department and the black community is the fact that Detroit suffered major riots in 1943 and 1967 which requierd federal troops to subdue the violence. This Court has already discussed these riots and the major role that police-black community friction played in triggering each of them. This Court has also discussed the so-called "Kercheval incident" of 1966. In subsequent years the City underwent unrest triggered, in 1968, by the assassination of Martin Luther King, Jr. and, in the following years, by a special tactical police squad known as STRESS.

Vivid testimony was presented at trial regarding the New Bethel Church incident of 1969 by eyewitness police inspector Mack Douglas. Following reports that a white policeman had been shot near the New Bethel Church, twenty or thirty policemen converged on the building. The people inside the church were black and included women and children. The police went on an unprovoked rampage and began shooting and looting. The people in the church ducked for cover as best they could. The shooting was stopped by two black officers who physically removed the guns from the hands of the white officers. This incident is an extreme example of police practices which outraged the black community.[120]

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[120] This event is illuminative because it demonstrates the impact which black officers can have on discrimination within the Department. Inspector Douglas was emphatic in concluding that had there been a black lieutenant on the scene, the misconduct would not have occurred in the first place. When viewed in light of this example, the City's operational need defense is reasonable, if not compelling.

The Department paid a heavy price for its discriminatory practices. The defendants have accurately characterized what resulted as a "cycle of violence" as the Department and the black community warred on each other. Six to eight police officers a year would die in the line of duty; no officer felt safe in the black community. The burden of the discriminatory police practices, however, was ultimately borne by the black and white citizens of Detroit.

The black community's response to Department practices was deep hatred and alienation.[121] Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable.[122] The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty. Many times, crowds developed when the police arrived at the scene of a crime. These crowds were often hostile to the police and interfered with them.

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[121] Almost every witness at trial testified to this effect. The National Advisory Commission on Civil Disorders also found this to be true — nationwide and in Detroit. A 1973 opinion survey by Market Opinion Research found statistically significant disparities in the perceptions of black and white residents toward the police. Unsurprisingly, the black citizens' responses were far more negative.

[122] The testimony of Inspector Harold Johnson showed that there was sound basis for the community's feeling. He found that there were time delays in responding to calls from black neighborhoods, which were caused by the attitude of "let them kill themselves and we will go pick up the pieces."

White officers who had responded to a radio run often had to get assistance for themselves. The police themselves — and ultimately the citizens of Detroit — were the real victims of discriminatory practices.

B. Prevailing Attitudes in the Police Department

The underlying cause of the above problems was the Department's attitude toward blacks. As indicated in other sections of this opinion, the Department was overwhelmingly white through the mid 1970s, largely because of discriminatory hiring practices. The Department did not go out of its way to hire racist police officers or to breed racism; rather, the Department reflected the prejudices of the white society. These prejudices were aggravated because many neighborhoods — and criminal suspects — were black. The Department had constant contact with the black community, much of it involving the arrest of black offenders. Individual prejudice had many opportunities to manifest itself.

The predominantly white composition of the Department facilitated discrimination. White officers knew that their fellow white officers were tolerant of discrimination against blacks. As a result, discriminatory behavior flourished. The black community, in turn, came to hate most white officers. Those white officers who were not prejudiced felt the hostility of the black community and the hatred of the black crowds which gathered at the scene of the crimes. They responded with resentment of the community's attitude. Thus, the prejudice of some white officers spawned a cycle of violence and alienation in which both the Department and the community was caught.

When understood in this light, the operational needs argument makes a great deal of sense. More black officers in the Department did not necessarily mean that prejudicial attitudes would go away, but it did mean that prejudicial practices would be reduced. Occupational solidarity among white

officers was what facilitated discrimination in the first place. It is one thing to verbally or physically abuse a black citizen or prisoner in front of a group of fellow white officers. It is quite another to do the same thing in front of some black officers. Increasing the number of black officers broke the occupational solidarity which made discriminatory practices easy.

Correspondingly, increased numbers of black officers provided reassurance to the black community that the City was serious about eliminating discrimination. The presence of black officers was instrumental in breaking the cycle of alienation and violence. The presence of black officers was a critical factor in changing the black community's perception of the police and winning their cooperation in fighting crime.

Plaintiffs argue that what matters is not so much the presence of black *lieutenants* as the presence of black *patrolmen* who are the ones out on the street. The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused. He specifically cited the incident at New Bethel Church, which is described above, as an instance of police misconduct toward blacks which would not have occurred had there been a black lieutenant on the scene.

Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:

> "When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will

cooperate with us. They don't feel that we are an army of occupation."

The testimony at trial showed that black lieutenants have other beneficial effects. At the precinct, they directly oversee how persons under arrest are treated. They help ensure that laws are enforced equally and that an arrest was proper. Deputy Chief Reginald Turner gave an illustrative example of a common problem which a black lieutenant helps solve:

> "All too often, [domestic relations assault] complaints in predominantly white precinct stations, where the staff inside the station is predominantly white, and the victims or complaining people are black, are quite often shunted aside. They are told there is no crime."[123]

Two other examples were mentioned at trial. Inspector Mack Douglas commented upon the leadership of black lieutenants in handling crowds and demonstrators. He testified concerning an incident where a white officer had gotten into an altercation with a black woman whom he had stopped for a traffic offense. A hostile crowd of 40-50 blacks had gathered and a cry of "officer in trouble" was put out over the radio. Then-lieutenant Douglas, who is black, rushed to the potentially-explosive scene. He was able to calm the crowd, assure them that he would personally look into the incident, and persuade them to disperse.

Chief Hart testified concerning a barricaded gunman situation. When dealing with this crisis situation, the police have to handle both the gunman and the crowds which inevitably develop. In the past, the crowds were often hostile to white

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[123] This Court did sustain a motion to strike part of Deputy Chief Turner's testimony immediately afterward. However, it is clear from the transcript that the testimony quoted in the text was not part of that stricken.

officers. With a black lieutenant in control, the crowds were not a problem.

Plaintiffs emphasize that race should not be an overriding factor. They fault the affirmative action plan for placing considerations of race ahead of considerations of individual merit. They correctly point out that there are some white officers who relate well to blacks because they grew up in the black community, etc. And some black officers might be unable to relate well to any citizens — white or black. This argument has force. In fact, it was considerations such as these which persuaded the Department to institute the oral board testing procedure as part of the promotional model.

Plaintiffs' argument is theoretically valid but does not work in the real world. Given the history of racial tensions in Detroit, black officers were far more likely to relate well to the black community. The white officer who had grown up in the black community and had the community's trust and confidence was the exception. Further, things had reached the point where such officers were engulfed in the cycle of alienation and violence between the Department and the community. It is clear that racial classifications were in order to change the perceptions of both white officers and the black community.

The empirical proof that racial classifications were needed is the testimony of witness after witness as to the results of affirmative action hiring and promotions. Chief Hart in particular noted the harmony which has gradually developed between the Department and the community. He testified that as a result of the affirmative action program, there was a significant decrease in discriminatory police practices and a concomitant increase in good feelings toward the Department. The affirmative action program gave the Department the credibility in the black community which had been absent previously. The Department had historically been all but off-limits to blacks. Now the community saw increasing numbers

of their friends and neighbors in the Department, and at all levels.

The good feeling which developed was evident in many ways. A survey by Market Opinion Research found that while white attitudes toward the Department had stabilized, there was a "dramatic increase" in the number of blacks rating the relationship between the police and the community as "good." 22% of black citizens surveyed so characterized the relationship in 1973; 43% did so in 1978. Chief Hart testified that the "occupation army" mentality melted away as did problems of hostile crowds and sullen, uncooperative citizens.

Chief Hart and Deputy Chief Bannon directly linked the dramatic improvement in police-community relations to the affirmative action plan and its objective of having a police force reasonably representative of the community it policed. Former Police Commissioner Patrick Murphy testified that where white officers did not share the cultural values and backgrounds of black citizens, courses in black culture or sensitivity training in race relations for white officers did not work. In Commissioner Murphy's eyes, all the training in the world could not "substitute for the understanding, the deep perceptions of people who have come from the minority background and culture." The fact that other Departmental efforts to improve police-community relations were, in the words of Deputy Chief Bannon, "absolutely ineffective," demonstrates the truth in Commissioner Murphy's words, and confirm the need for more black officers at all ranks.

The testimony at trial additionally linked the affirmative action plan to less citizen complaints, less shootings of police officers, and ultimately a lowered crime rate. Chief Hart and Deputy Chief Bannon testified that the affirmative action plan dramatically reduced citizens' complaints filed against the Department. Chief Hart testified that the plan resulted in a reduction of the number of officers killed in the line of duty of

from 6 to 8 each year to zero. Chief Hart testified at trial that no police officer has been killed in the line of duty since 1974, when the affirmative action plan was instituted. Chief Hart also testified that crime was reduced significantly because of police-citizen cooperation fostered by the affirmative action program. Former Chief Tannian corroborated these views:

> "After we put substantial numbers of minorities in a supervisory capacity on the street, I found that the number of complaints from a racial standpoint went down and the level of cooperation in terms of information that witnesses at the scene just gratuitously offered improved, and the most significant example of fact that I can point to is the homicide area. When I took over the Police Department the homicide solution rate was between 50 and 60 percent and when I left the Police Department it was between 70 and 80 percent, and I am claiming that that is a direct result of citizen cooperation."

The plaintiffs question the conclusions drawn by the above-cited witnesses. They point out that cause and effect relationships between the affirmative action program and crime or citizens' complaints are very difficult to draw. Chief Hart and Deputy Chief Bannon both conceded that various factors in addition to the affirmative action program may have contributed to the reduction in crime. However, both adhered to their view that the program was a significant factor in causing crime reduction.

There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action

program and its general aim of having the Department — at all levels — reflect the City's population. As plaintiffs' counsel has ably argued, there are many difficulties with drawing simple conclusions about difficult problems. However, upon careful review of the testimony, this Court believes that no reasonable person could fail to conclude that given the history or antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis.

The plan's success in improving police-community relations and ultimately the quality of life in the City is clear on this record. The Court notes that numerous prestigious national commissions have cited the need to hire and promote black officers and to have the police department reflect the community it serves.[124] Detroit's experience, fully outlined at trial, confirms the wisdom of those recommendations.

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[124] See Nat'l Advisory Comm. on Criminal Justice Standards and Goals, Police (1973); Nat'l Comm. on Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the Nat'l Advisory Comm. on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of *Justice, Task Force Report*: The Police (1967); Report on the Causes of Crime 242, Nat'l Comm. on Law Observance and Enforcement (Vol. I, 1931) ("the Wickersham Commission.")

The need to have a police department reasonably reflect the city it serves has been commented upon by various courts:

> "Perhaps the most critical consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal employment opportunity. This is a police department and the visibility of the black patrolman is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement." *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm.*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). *See also NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *League of Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873, 896-7 (N.D.Cal. 1976).

VIII. CONCLUSION

[26] The discriminatory treatment of black officers and black citizens outlined in this record demonstrates well the truth in Mr. Justice Marshall's strong words in his dissenting opinion in *Bakke*:

> [F]or several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot. 438 U.S. at 400-01, 98 S.Ct. at 2805.

These are the reasons why the City's affirmative action program is morally just and necessary.

It is unfortunate that affirmative action programs such as the one this case concerns are still needed. No one relishes making racial classifications. However, until our society progresses further, affirmative action will remain a necessity. As Mr. Justice Blackmun stated in his dissenting opinion in *Bakke*:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat

some persons equally, we must treat them differently. 438 U.S. at 407, 98 S.Ct. at 2808.

Affirmative action is not pleasant for those members of the majority group who are directly affected by it. This Court can sympathize with the feelings of white officers who are passed over for promotion because of the affirmative action plan. They had studied long hours and this Court has no reason to question their oft-stated emotional hurt at being passed over for promotion. Of course, loss of pay and other emoluments is an ever-present and tangible harm as well.

At the same time, the impact should not be overstated. Although there was testimony that the affirmative action plan had caused divisiveness within the Department,[125] this Court finds it far more significant that affirmative action has substantially reduced the deep hostility between the black community and the police department. This has led to a safer, more pleasant city for officers and citizens alike. Moreover, plaintiffs themselves admit that of the 54 plaintiff class members, 40 have already been promoted to the rank of lieutenant. Thus, it appears that as a practical matter, the effect of the affirmative action program is to guarantee blacks access to the lieutenants' rank, but only to postpone access for some white officers who would otherwise have been promoted earlier.

A key theme throughout these proceedings is that the individual plaintiffs are the wholly innocent victims of the City of Detroit's affirmative action plan when it was the City itself which was guilty of the original discrimination to start with.

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[125] The source for this view was the plaintiffs themselves. A psychiatrist who held a mass session with 20 members of the class corroborated that plaintiffs felt alienated and hostile because they were "passed over." Plaintiffs' expert *testing* witness was quick to testify of his observations of racial hostility within the department. Whatever hostility is deemed to exist, it does not appear to have hurt the effectiveness of the Department.

At the very least, the plaintiffs want "front-pay" for the positions they say they should have gotten.

Variations on this theme have come up throughout these proceedings. Plaintiffs claim that the City should be estopped to argue that its own exam was not job-related. Plaintiffs claim that the City should bear a heavy burden of proof in proving the issues in this case because it has control over the evidence.

However, acceptance of any of plaintiffs' arguments would destroy voluntary affirmative action by an employer by making its cost prohibitive. It is true that affirmative action upsets the expectations of white workers, but such expectations are indeed tainted when they are based on a legacy of discrimination.

No one has a right to be promoted, and how one receives a promotion in the Department has often been a matter of chance. Two examples of actual occurrences in Department history demonstrate this. First, in 1970 the Department gave two examinations for promotion to the rank of Sergeant. The first was the "regular" Sergeants examination. The second was a special examination which was given to all persons with the rank of Detective. The Department had decided to abolish the rank of Detective and made a "political" settlement with the Detective's Union. Every Detective who took the exam was given a passing score and was promoted to the rank of Sergeant.

Second, in 1970, the Department decided to increase the numbers of supervisory personnel. All 377 candidates who placed on the "regular" Sergeants list that year were ultimately promoted. As has been previously noted in this opinion, between 1967 and 1974 the ratio of sergeants to police officers was reduced from 1:10.8 to 1:3.4. The ratio of lieutenants to police officers was reduced from 1:23.8 to 1:17.4.

The beneficiaries of the above policy decisions were overwhelmingly white, since there were few black officers in the Department eligible for promotion in 1970. The Department's decision to flood the sergeant's rank is indeed curious since it came just before large numbers of black officers, hired after the 1967 riot, were eligible for promotion.

The City's affirmative action program should not be seen as depriving white officers of any right to a promotion. Instead, it should be seen as a program conferring a bonus on blacks who, as a group, have been subject to past discrimination. White officers in 1970 received an unexpected bonus when the Department decided to promote everyone on the Sergeant's eligibility list. White officers cannot reasonably complain when the Department, on a finding of past discrimination and operational need, decided to confer a "bonus" on blacks in 1974 and subsequent years.

Plaintiffs have also complained throughout these proceedings that the affirmative action plan is harsh and unjustifiable because it does not rest on individual considerations of merit. The Court feels that the opposite is true. The nonretributive, class-based nature of affirmative action is perhaps its strongest asset. Affirmative action is prospective, it seeks to remedy and not destroy. When done voluntarily, it accuses no individual of wrongdoing.

In this case, the individualized consideration plaintiffs demand invites individualized consideration of them. This would open up a Pandora's box of recriminations, which would be at best unhealthy. For years blacks in the police department were treated like second class citizens. It was not the City which did this, it was the white officers. It was the white officers who were guilty of mistreating black citizens. It was white officers who went on a ticket strike in 1959 when the City proposed integrating squad cars. It was white officers who fiercely resisted efforts to integrate the department throughout the 1960's.

This court has no way of knowing if any of the members of the plaintiff class were guilty of such practices or of condoning such practices.[126] The Court hopes that none were. The City did not follow up opportunities to pursue such inquiries at trial; it did not seek retribution. The City did not ask what the plaintiffs and the Lieutenants and Sergeants Association were doing during the many years that white officers abused black officers in the department and black citizens on the street. This Court will not ask either.

Instead, this Court will uphold the City's affirmative action plan as proper under federal and state law.[127] It is proper because it undoes years of discrimination. It is proper because

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[126] None of the plaintiffs who testified at trial admitted witnessing any discriminatory practices in the Department.

At trial, former Lieutenants and Sergeants Association president Joseph Clark, who had served in the Department since 1952, testified that he was unaware of any segregation within the police department during his 26-year career. He was also unaware of any gulf between the black community and the police department. He also testified that he never gave much thought while he was in the department to whether there existed discrimination against blacks in hiring or promotions. When questioned about the 1959 ticket strike by white officers opposing the integration of squad cars, Sergeant Clark responded as follows:

> The incident you are talking about occurred when the city fathers decided that we couldn't work with the people we picked out or that picked us, that were were going to split all these crews up and equally integrate them. That's when the trouble started.

Seargeant Clark later noted that squad cars were "not segregated," it was just a question of officers who "chose their partners."

[127] Throughout these proceedings, plaintiffs have argued that findings of fact in *DPOA v. Young*, 446 F.Supp. 979 (E.D.Mich.1978), should collaterally estop defendants from relitigating many of the issues in this case. The Court has disagreed. *Weber* and *Bakke*, superseding and controlling decisions that they are, destroy any argument for applying collateral estoppel here.

it serves vital City needs. It is proper because it looks to the future as a means of remedying a sorry past.

Plaintiffs are quite right that some form of terminating period needs to be placed on the affirmative action plan — either a date or a point at which the Department reaches a certain racial balance. The Board of Police Commissioners has held up on this pending the outcome of this litigation. The Court will request that the Board meet and establish such an end point, which will be reviewed by this Court for reasonableness. Thereafter, judgment will be entered for the defendants and the complaint dismissed.

FINAL OPINION

Cite as 504 F Supp 841 (E.D. Mich, 1980)

KEITH, Circuit Judge, Sitting by Designation.

This case concerns the affirmative action program of the Detroit Police Department. Numerous opinions of this Court have discussed the program at length. After a long trial this Court entered an extensive opinion on October 1, 1979, upholding the City's affirmative action program. The only caveat in this Court's opinion was that some form of end-date needed to be placed on the program. To that end, this Court requested that the Board of Police Commissioners meet and establish an end-date, which this Court would review for reasonableness. The Board has met and established an end-date, and both sides have moved for entry of a final order in this case. In addition, the City defendants have moved for costs, and the intervenors have moved for attorney's fees. Each of these issues was heard at oral argument on March 19, 1980. At the hearing, this Court reviewed the Board of Police Commissioner's actions, and concluded that the end-date was appropriate and reasonable. The Court requested that the parties draw up a final order, and submit it to the Court. The parties have been unable to agree on a final order. Because of

this, and because this Court reserved a ruling on costs and attorney's fees, this Court herein sets out its final opinion and judgment.

I.

[1, 2] In its October 1, 1979 opinion, this Court approved the City of Detroit's affirmative action program as it related to promotions from Sergeant to Lieutenant.[1] This Court endorsed the City's 50/50 Black/White promotions formula. This Court further endorsed those affirmative action promotions which had taken place up until that time. Because the Board of Police Commissioners had not established an end-period to the affirmative action promotions, this Court requested that the Board do so. The Board convened on three separate occasions for the purpose of establishing a termination point to the affirmative action plan. Public hearings were held, and counsel for the plaintiffs actively participated. The Board adopted the following final resolution on December 20, 1979:

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[1] This court denied a jury trial in this case on the grounds that actual and punitive damages were unavailable because the City had acted in good faith. *Baker v. City of Detroit*, 458 F.Supp. 379 (E.D.Mich.1978). At the time the jury trial issue was briefed and argued, neither *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) nor *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) had been decided. Plaintiffs were proceeding on the assumption that reverse discrimination suits present the same considerations that "ordinary" discrimination suits do. It is now clear, however, that such suits are very different.

In an "ordinary" discrimination case, the sue is whether an employer violated the law by intentionally discriminating against the plaintiff or by adopting hiring or promotions criteria which are not job-related but which adversely impacted against members of a minority group. *See e. g.*

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Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). In a "reverse" discrimination case, however, where an affirmative action plan is under attack, no such issues are presented. There is no question that affirmative action programs discriminate against whites in the sense that the opportunities of whites for hiring or advancement are less than they would otherwise be. The question in a "reverse" discrimination case is whether the affirmative action plan is a reasonable response to past discrimination. As Judge Lively, writing for the court, noted in *DPOA v. Young*, 608 F.2d 671, 697 (6th Cir. 1979):

> *Bakke* and *Weber* make it clear that a case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain, and the official actions complained of must be subjected to the analysis prescribed in *Weber* and the plurality opinion in *Bakke* which we find controlling.

The analysis to be done in a reverse discrimination case does not present any jury issues — only questions of law for a judge to decide. Only a judge can make the legal determination of whether an affirmative action program was a reasonable response to past discrimination.

This case illustrates this proposition. Although there was a lengthy trial here, there were no disputed issues of fact which could have been submitted to a jury. The existence, operation and effect of the City of Detroit's affirmative action plan are a matter of record. There is simply no dispute as to when, how and why the Board of Police Commissioners operated the affirmative action plan. *See Baker v. City of Detroit*, 483 F.Supp. 919 (E.D.Mich. 1979).

Nor was there any real dispute about past discrimination in the Detroit Police Department. The plaintiffs presented no countervailing evidence on this question. They only tried to blunt the defendant's presentation

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WHEREAS, the Board of Police Commissioners in July of 1974, made a finding in its public session that the Detroit Police Department had been guilty of unlawful racial discrimination in its hiring and promotional practices;

WHEREAS, the Board of Police Commissioners has received from the Department numerous documents and statistics that indicate the Department is still adversely affected by the effects of past discrimination;

WHEREAS, the Board of Police Commissioners has received from the Chief of Police a written presentation outlining the reasonable goals and objectives of the Affirmative Action Plan;

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through cross-examination. Indeed, plaintiff's contention throughout was that any evidence as to past discrimination was irrelevant and inadmissible because they, as innocent parties, should not bear the brunt of affirmative action. Moreover, while this court did make extensive findings of fact concerning past discrimination in the Detroit Police Department, such findings are integral to the question of whether the City's affirmative action plan was reasonable. It is clear that there was no issue, even relating to past discrimination, which could have been presented to a jury. The issue in a reverse discrimination case is how much affirmative action is allowable in light of a history of past discrimination. It is for the judge — and not a jury — to decide whether past discrimination by the entity in question justifies the affirmative action program in question.

This court notes that in a recent case the Fifth Circuit reached a similar conclusion in a case where the plaintiff alleged that his due process rights had been violated. *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980). Judge Tuttle wrote:

> While a jury can certainly determine contested issues of fact, it cannot make determination of law, such as whether [the plaintiff] "waived" his rights, or was provided "adequate" notice. These determinations of how constitutional standards are to be applied to the case at hand can only be made by the judge, since they are questions of law. *Downing, supra* at 617.

WHEREAS, the Board of Police Commissioners has received numerous exhibits and documents from the Chief of Police showing the continued drastic under-representation of Blacks at the rank of sergeant and lieutenant;

WHEREAS, the Board of Police Commissioners is convinced that in order to improve its operational effectiveness in crime prevention and solution, that the number of Blacks at the ranks of sergeant and lieutenant be increased;

WHEREAS, the Board of Police Commissioners has determined that the Affirmative Action Plan, as proposed by the Chief of Police, is substantially related to the objectives of remedying the effects of prior discrimination;

WHEREAS, the Board of Police Commissioners has received substantial evidence that the Affirmative Action Plan was substantially related to the objectives of improved law enforcement;

WHEREAS, the Board of Police Commissioners has determined that achieving the objective of improved law enforcement; [sic]

WHEREAS, the Board of Police Commissioners has determined that achieving the objectives of remedying the effect of past discrimination require the implementation of a certain promotional ratio;

WHEREAS, the Board of Police Commissioners has received substantial evidence and statistics tending to show that a 50/50 promotional ratio will improve the law enforcement capability of the Detroit Police Department;

WHEREAS, The Board of Police Commissioners has concluded that a 50/50 ratio is the most reasonable method of achieving the goal in order to insure promotional opportunity to all persons in the Detroit Police Department to the ranks of sergeant and lieutenant;

WHEREAS, the Board of Police Commissioners has concluded that the 50/50 ratio is the most reasonable means available to correct the harsh effects of past discrimination;

WHEREAS, the Board of Police Commissioners has concluded that the 50/50 ratio serves to enhance public safety by improving law enforcement;

WHEREAS, the Board of Police Commissioners has been assured that all persons recommended for promotion to the ranks of sergeant and lieutenant are substantially equally qualified to perform the job for which they are being selected;

WHEREAS, the Board of Police Commissioners wishes to adopt and incorporate by reference the written presentation of all exhibits, documents, minutes of its meeting wherein it deliberated the promulgation and adoption of this Plan;

WHEREAS, the Board of Police Commissioners has determined that the program as described and the Chief's recommendations will achieve the objectives as provided for in the written presentation in as fair a manner as possible for all concerned;

WHEREAS, the Board of Police Commissioners determines at this time that an end-goal of 50% Black officers at the ranks of sergeant and lieutenant is appropriate in order to meet the objectives of the Affirmative Action Plan subject to a radical shift of the demographic composition of the City of Detroit or some other unforseen factor that markedly alters the circumstances;

WHEREAS, development of a job related, validated and race-neutral promotional model is essential to barring discrimination in the future and, therefore, to achieving a termination of the Affirmative Action Plan;

WHEREAS, the Board of Police Commissioners is of the opinion that a job related, validated and racially-neutral promotional model for promotions to the ranks of sergeant and lieutenant is essential to the proper functioning of the Department;

WHEREAS, the Board of Police Commissioners has received legal advice from its counsel that the Affirmative Action Plan is lawful;

WHEREAS, the Board of Police Commissioners has been informed that it is under a legal obligation to remedy the effects of the Department's prior unlawful practices; and

WHEREAS, the Board of Police Commissioners has been assured by its counsel that there are no existing legal impediments to the adoption of the Affirmative Action Plan as described.

THEREFORE, BE IT RESOLVED BY THE BOARD OF POLICE COMMISSIONERS THAT:

1. The Chief of Police is authorized and instructed to take Affirmative Action to promote individuals from Personnel Orders 77-527 and 77-528, pursuant to the Affirmative Action Resolution adopted by this Board on July 31, 1974, and reaffirmed on December 28, 1976, August 4, 1977, and, also, Section 7-114 of the Charter of the City of Detroit which permits the Chief of Police to pass over individuals on the eligibility register after the Chief of Police files, as he has done, written reasons acceptable to this Board.

BE IT FURTHER RESOLVED THAT:

2. An end-goal of 50% Black officers at the rank of sergeant and lieutenant is appropriate at this time in order

to meet the objectives of the Affirmative Action Plan, subject to a radical shift of the demographic composition of the City of Detroit or some other unforseen factor that markedly alters the circumstances.

BE IT FURTHER RESOLVED THAT:

3. The Affirmative Action Plan for promotion to the ranks of sergeant and lieutenant will terminate when the end-goal is attained.

BE IT FURTHER RESOLVED THAT:

4. The Department is directed to develop, as soon as possible, a job-related, validated and racially-neutral promotional model for the ranks of sergeant and lieutenant.

As this Court noted in open court on March 19, 1980, the Board's 50% population-based affirmative action end-goal is reasonable. Direct support for this conclusion comes from *D.P.O.A. v. Young*, 608 F.2d 671 (6th Cir. 1979), *rev'ng* 446 F.Supp. 979 (E.D.Mich.1978). There, Judge Lively noted that "a ratio requirement equivalent to the racial proportion of the labor market ordinarily achieves the racial balance which would have existed but for discrimination." *Id.* at 697. *See Id.* at 606-97. *Accord United States v. City of Miami, Fla.*, 614 F.2d 1322, 1339 (5th Cir. 1980).

The parties are in dispute, however, over what form a final decree should take. The plaintiffs simply state that this Court found the City's action to be constitutional, and that this should be the extent of a final order. Plaintiffs apparently are considering challenging the City's affirmative action program in state court on state law grounds. The defendants want this Court to affirmatively decree that the City is to continue the affirmative action plan.

In this Court's October 1, 1979 opinion, this Court found that the City of Detroit was under an affirmative constitutional

duty to conduct affirmative action promotions. The issues of past discrimination and operational need have been fully litigated. Because the City voluntarily adopted affirmative action, this suit by the white plaintiffs placed this Court in the position of reviewing the City's program and affirmative action end-goal. Had no voluntary affirmative action occurred and had black officers filed suit against the City for past discrimination, the issues would not have been significantly different. Such a suit might well have resulted in this Court's imposition of an affirmative action plan upon the City of Detroit.

[3] The question that has been raised, then, is a novel one. Where an affirmative action plan has been voluntarily entered into and sustained against a reverse discrimination challenge, what is the effect of a court's ruling sustaining the affirmative action plan? In this Court's view, the City's affirmative action plan must have the force and effect of an order of this Court.

There are important reasons why this Court should enter a decree. First and foremost is judicial economy. The City's affirmative action plan as it relates to promotions from sergeant to lieutenant has been fully litigated in this forum. There is no reason to allow additional attacks on the plan to take place in the future. Second, this Court has concluded that the City is under an affirmative constitutional duty to maintain affirmative action.[2] There should be no doubt about the meaning and effect of this Court's determination. Affirmative action is required, not merely permitted.

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[2] This court notes that in a recent case the Ninth Circuit has ruled that there is no constitutional duty for an employer to take what it terms "stacked deck" affirmative action, i. e., affirmative action which favors minority employees or applicants over majority employees or applicants. *Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d

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Finally, there is the important policy consideration of encouraging voluntary affirmative action. Reverse discrimination suits place an employer — especially a municipality — in a difficult position. A court which upholds a voluntary affirmative action plan against attack should protect the plan by giving it the effect of a decree. Otherwise, as appears to be the case here, continuing efforts to undermine affirmative action

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1381 (9th Cir. 1980). The distinction between what the Ninth Circuit terms "stacked deck" affirmative action and "reshuffle" affirmative action is that in the latter instance the state only insures equal access to a benefit. This distinction has no basis in precedent, although it is an interesting one from a theoretical perspective.

In ruling that there is no constitutional duty to take race-conscious affirmative action, the Ninth Circuit fails to take into account the broad language in opinions such as *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) and *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) that a state must "eliminate the discriminatory effects of the past as well as bar like discrimination in the future". *Id.* at 154, 85 S.Ct. at 822. The scope of the state's duty is determined by the scope of the violation. This court might agree with the Ninth Circuit that general societal discrimination against blacks does not impose a general constitutional duty to take race-conscious affirmative action. However, where harsh past discrimination has left a police or fire department with a severe underrepresentation of blacks, nothing less than race-conscious affirmative action can undo the past discrimination. Simply allowing blacks access to the department would effectively continue years of discrimination. For this reason, this court believes that there are circumstances where race-conscious affirmative action is constitutionally required. For the reasons outlined in its previous opinion, this court also believes that such circumstances are present in this case, and that the City of Detroit is under an affirmative constitutional duty to eliminate the effects of its past discrimination by instituting a race-conscious affirmative action plan. This court notes that this view is in accord with *DPOA v. Young*, 608 F.2d 671, 691-92 (6th Cir. 1979), which is controlling law in this circuit.

will take place on various fronts. The Equal Employment Opportunity Commission has promulgated guidelines concerning affirmative action. 29 C.F.R. § 1608, *et seq.* In these guidelines the Commission emphasized the need for voluntary compliance with Title VII and that "those taking such action should be afforded the protection against Title VII liability which the Commission is authorized to provide under Section 713(b)(1) [42 U.S.C. § 2000e-12]" 29 C.F.R. § 1608(c). These same considerations should lead this Court to protect — and supervise — a voluntary affirmative action plan. The best way to do this is to give the affirmative action plan the effect of a judicial judgment.

The procedural posture of a reverse discrimination case such as this one is very similar to that presented by a consent decree. Had black officers or the U.S. Government filed a suit alleging illegal discrimination on the part of the City of Detroit and seeking affirmative relief, it is likely that such a suit would have settled and a consent decree entered. That consent decree would than have been subject to judicial review, after due opportunity for intervention and/or objection by white officers. This was the procedural posture of, for example, *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980) and *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980).

A voluntary affirmative action program is very similar to an affirmative action program contained in a consent decree. In a consent decree, the parties agree on a court order in order to terminate ongoing litigation. The fact that the injunction was drafted by the parties and only subject to approval by a court does not affect its validity or enforceability as a judgment. *United States v. Swift & Co.*, 286 U.S. 106, 115, 52 S. Ct. 460, 462, 76 L.Ed. 999 (1932).

[4] In a voluntary affirmative action situation, an employer or municipality, after making a self-assessment, institutes a voluntary affirmative action program. A suit claiming that the affirmative action plan is illegal places a court in

the position of reviewing the affirmative action plan to see if it is reasonable in light of past discrimination. This is similar to the position that a court is in when it must pass on an affirmative action consent decree which has been objected to by intervening defendants. *See United States v. City of Miami*, *supra*. There is no reason to make meaningless distinctions. A voluntary affirmative action plan which has been challenged in court should be treated like a consent decree.

[5] Any other ruling by this Court would needlessly encourage sham litigation.[3] An employer or municipality which contemplates voluntary affirmative action would seek to protect itself by arranging a lawsuit by minority plaintiffs and then quickly consenting to affirmative action relief. A better rule of law would permit voluntary affirmative action, subject to judicial review if attacked. If the affirmative action plan is upheld, however, the approved plan should be treated as a court judgment, just as a consent decree is. It is this rule of law which this Court will adopt.

In *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) the Supreme Court established a "zone of reasonableness" for voluntary affirmative action by a private employer. This Court has taken the position that the *Weber* test should be extended to reverse discrimination claims brought under the Fourteenth Amendment. However, the complete litigation which took place here has enabled this

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[3] This problem is a real one. In *Alexander v. Bahou*, 86 F.R.D. 194 (N.D.N.Y. 1980), the mayor and fire chief of Syracuse wished to institute affirmative action, but were blocked by the New York State Civil Service Law. They then instituted an action in federal district court, seeking authority to deviate from state law to the extent necessary to increase minority hiring in the Syracuse police and fire departments. The Justice Department intervened, and filed its own Title VII suit. The entire controversy was finally resolved via a consent decree which was approved by the district judge.

Court to determine that affirmative action is required. The evidence in this case goes far beyond *Weber's* requirements. Thus, there is no need to outline under what specific circumstances a court should not affirmatively order that a voluntary affirmative action plan continue. Such circumstances are clearly not present here.

There is no question that this Court has the authority to enter a judgment directing that affirmative action continue. The City, in its answer, requested this relief.[4] The Seventh Circuit has recently approved an affirmative decree directing a school board to continue a voluntary desegregation plan. *Johnson v. Board of Education of City of Chicago*, 604 F.2d 504 (7th Cir. 1979) vacated for consideration of mootness, ____ U.S. ____, 101 S.Ct. 339, 66 L.Ed.2d 162 (1980). The desegregation plan in *Johnson* had been challenged by disgruntled students who were affected by it. The Seventh Circuit upheld the school board's plan, and affirmed the district court's injunction ordering that the plan continue. Accordingly, this Court will enter final judgment ordering the City of Detroit to maintain its affirmative action program.

II. Attorney's Fees

The defendant, City of Detroit, has not requested attorney's fees from the plaintiffs. However, the intervening defendants, the Guardians, have requested that they be awarded attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k).

The Guardians of Michigan and seven individuals are the intervening defendants in this case. The intervenors are black police officers who have benefited or would benefit from affirmative action promotions.

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[4] *See* plaintiff's request for relief, in Answer to First Amended Complaint, filed May 25, 1977.

The plaintiffs filed these cases in October and November of 1975.[5] Trial did not begin until August of 1978. The intervenors did not move to intervene until May 18, 1978. This court allowed intervention over plaintiff's objections.[6] Plaintiffs now claim that it would be unfair to order them to pay attorney's fees to the intervenors. Plaintiffs also claim that under the rule advanced in *Christiansburg Garment Co. v. EECC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) attorney's fees cannot be assessed against them unless their suit was frivolous.

The intervenors explain that they felt the need to protect their own interests. This need became acute, they say, after another district judge of this bench issued an opinion finding that affirmative action promotions of blacks from patrolmen to sergeant were unconstitutional. *DPOA v. Young*, 446 F.Supp. 979 (E.D.Mich.1978), *rev'd*, 608 F.2d 671 (6th Cir. 1979).

As this Court has noted throughout this litigation, reverse discrimination suits are far different, procedurally and analytically, from "ordinary" discrimination suits. The employer which voluntarily initiates affirmative action and is sued by a person who is adversely affected by the program is in a difficult position. The employer may have to show its own past discrimination against blacks to justify its affirmative action plan. For a variety of reasons, employers will be reluctant to do this. This was the dilemma which the Supreme Court answered in *Weber* regarding a private employer: voluntary affirmative action is proper when it is a temporary response to a radical imbalance in traditionally segregated job categories. That way an

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[5] Case No. 5-71937 was filed on October 7, 1975, by Kenneth A. Baker and six other individuals. Case No. 5-72264 was filed by Hanson Bratton, four other individual white male sergeants and the Detroit Police Lieutenants and Sergeants Association. This latter case was filed in Wayne County Circuit Court, and was removed to this court on November 26, 1975.

[6] The Motion to Intervene was granted on July 6, 1978.

employer does not have to indict itself to justify the voluntary affirmative action program.

At the time of trial in this case *Weber* had not been decided. Today *Weber's* applicability to state employers is not definitely settled, although it soon may be. *See Minnick v. California Dept. of Corrections*, 95 Cal.App.3d 506, 157 Cal.Rptr. 260 (1st App. Dist.) (1979), *cert. granted*, ____ U.S. ____, 101 S.Ct. 348, 66 L.Ed.2d 211 (1980). One way to minimize the employer's dilemma in a reverse discrimination case is to allow intervention by parties who have an incentive to introduce evidence of past discrimination. That is why this Court allowed the Guardians to intervene in this case.

There was sound reason to allow intervention. There was no guarantee that the City would provide extensive evidence of its own past discrimination in justification of the affirmative action plan. The district court in *DPOA v. Young*, 446 F.Supp. 979 (E.D.Mich.1978) had not found the City's justification for affirmative action to be acceptable. Fairness dictated that the black police officers who would be hurt by a ruling against affirmative action be heard. This is especially true since, in their amended complaint, the Bratton plaintiffs, among other forms of relief, requested that black officers who had already received affirmative action promotions be demoted to their prior rank.[7]

As it turned out, the City defendants, at trial, did present extensive evidence of past discrimination. With hindsight it could be argued that the presence of counsel for intervenors was unnecessary. At the same time, counsel for intervenors did an excellent job at trial. Counsel did not interfere with the presentation of either side's case. Counsel protected intervenor's interests, and presented useful additional evidence

[7] Bratton First Amended Complaint at 8. At the beginning of trial, the intervenors secured a stipulation with the plaintiffs striking this request for relief from the plaintiff's complaint.

at trial on the issue of past discrimination. Perhaps the intervenors should have moved to intervene earlier. However, the plaintiffs suffered no prejudice from this.

[6] This Court feels that an award of attorney's fees is proper here. Counsel for intervenors helped demonstrate why the City's affirmative action program was a necessary response to past discrimination. The intervenors furthered an important public policy of ensuring that the State remedy past discrimination.

It is especially appropriate that the Detroit Police Lieutenant's and Sergeant's Association (LSA) pay for the intervenor's attorneys fees.[8] The LSA is the union to which all of Detroit's Lieutenants and Sergeants must belong. This litigation has been funded, on the plaintiff's side, by the LSA. The union made a special ½% assessment of its membership to pay for this litigation. Thus, both white and black officers are helping pay for the plaintiff's case.

When confronted with evidence of past discrimination, the City of Detroit chose to favor black officers in promotions. The police union was then caught in a dilemma. Should it fight the affirmative action promotions or not? If the union opposed affirmative action, it would advance the interests of its white members at the expense of its black members. If the union acquiesced in affirmative action, it would be doing the opposite. The union chose to advance the position which was favored by a majority of its members — no affirmative action. By taking this position, however, the union was acting contrary to the interests of its black officers. Especially since the black officers have prevailed in this litigation, it is just to have the union pay for the representation afforded its own minority

[8] At the hearing held on this motion on March 19, 1980, counsel for intervenors made it clear that the request for attorney's fees was directed against the union, and not the individual named plaintiffs. Counsel for the union did not object to this limitation. This court agrees. Any attorney's fees should be paid by the union, and not individual plaintiffs.

officers. The Court repeats that counsel for the intervenors played an important, but subordinate, role in these proceedings. Counsel ensured that the interests of black officers would be fully protected.

[7] This Court believes that it has clear authority to award attorney's fees in this unique situation. It is true that ordinarily a prevailing defendant can only collect attorney's fees under 42 U.S.C. § 1988 if plaintiff's suit was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). In contrast, under 42 U.S.C. § 1988 or 42 U.S.C. § 2000e-5(k), a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances. *Christiansburg Garment Co., supra* at 416-17, 98 S.Ct. at 697-698. The rationale for this two-tiered standard comes from *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). Ordinarily plaintiffs, unlike defendants, are "private attorney generals" who act to eradicate unlawful discrimination. Thus, a defendant who is victorious should ordinarily not be allowed to collect attorney's fees unless the suit brought against him was baseless. Otherwise, too many plaintiffs would be deterred — and punished — for bringing discrimination claims. *See Christiansburg Garment Co., supra*, 434 U.S. at 419-20, 98 S.Ct. at 699-700.

This court has no quarrel with the *Christiansburg* rule. However, the Court feels that it is not applicable in the unique circumstances of this case. Direct support for this Court's conclusion is contained in the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.

> In the large majority of cases that party or parties seeking to enforce such [civil] rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may

be the defendants and/or intervenors. *See e.g. Shelley v. Kraemer*, 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161] (1948).

S.Rep.No.94-1011, 94th Cong.2d. Sess. 4, n. 4, U.S. Code Cong. & Admin.News, 1976, pp. 5908, 5912 (1976).

In *Shelley v. Kraemer, supra*, cited by the Senate Report, the Supreme Court reversed judgments of the Missouri and Michigan Supreme Courts. In the state courts, white plaintiffs had prevailed in their claims that restrictive racial covenants in the deeds of certain property were valid, and prevented blacks from owning the property. The Supreme Court held that the restrictive covenants violated the Fourteenth Amendment, and reversed. In that case, it happened that the parties whose rights were vindicated were defendants.[9]

[8] In the case at bar, it happens that the intervenors were defendants. They just as easily could have been plaintiffs or intervening plaintiffs had they, the United States, or other black officers filed suit against the City. The Civil Rights Attorney's Fee Act is to be liberally construed to effectuate its purposes. *See Northcross v. Bd. of Ed. of Memphis Schools*, 611 F.2d 624, 632-33 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). The procedural posture of the case should not be dispositive. The intervenors have vindicated their rights, and this Court believes it just and reasonable for the union to pay their attorney's fees. Accordingly, this Court does not feel that the restrictive *Christiansburg* defendant-recovery rule is applicable here. *See Riddell v. Nat'l Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980); *Kingsville*

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[9] Additional support is present in *Prate v. Freedman*, 583 F.2d 42, n. 2 (2d Cir. 1978) where the court in *dicta* stated:

It may well be that defendants may on occasion be characterized as "private attorneys general" who are entitled to the more favorable Supreme Court standard [in *Christiansburg*].

Indep. School Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980). *See also Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979) (attorney's fees awarded against intervening defendant pursuant to the Emergency School Act of 1972); *Brennan v. United Steelworkers of America*, 554 F.2d 586 (3rd Cir. 1977), *cert. denied*, 435 U.S. 977, 98 S.Ct. 1627, 56 L.Ed.2d 71 (1978). (Intervening plaintiff in Landrum-Griffin Act case could recover attorney's fees).

In summary, this Court finds that an award of attorney's fees is warranted. The presence of counsel for intervenors was useful and necessary. Counsel helped his clients to vindicate their rights. In the circumstances of this case, it is just to have the Lieutenant's and Sergeant's Association pay for the representation of both its black and its white officers.

[9] The Court notes that this sum should not be onerous. The intervenors did not take part in most pre-trial discovery. At trial, counsel for intervenors played a subsidiary role while counsel for plaintiffs and defendants presented the bulk of the testimony. Counsel for plaintiffs and counsel for intervenors are urged to agree on a figure for reasonable attorney's fees. Absent agreement, this Court will establish a figure after all appeals have been exhausted.[10]

III. Costs

Because of the novel nature of this litigation, this Court feels that all parties should bear their own costs in this Court.

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[10] This court's determination that attorney's fees should be awarded is a final, appealable order, even absent a determination of the exact amount to be awarded. *Memphis Sheraton Corp. v. Kirkley*, 614 F.2d 131 (6th Cir. 1980).

IV. Conclusion

In sum, this Court finds that the City's Affirmative Action Plan is both reasonable and required. The plaintiff Police Lieutenant's and Sergeant's Association shall pay reasonable attorney's fees to the intervening defendants. All other parties will bear their own costs.

Filed: November 17, 1980
Case No: 5-72264

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH BAKER, ARTHUR BARTNICZAK, HANSON BRATTON, PATRICK JORDAN, FRANK KREZOWIK, ELBERT MCVAY and ROBERT SCALLY,
Plaintiffs,

and

Case No.: 5-71937

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, Individually and on behalf of all others similarly situated and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,
Plaintiffs,

v

CITY OF DETROIT, a Municipal corporation; PHILIP G. TANNIAN, Chief of Police; COLEMAN A. YOUNG, Mayor, City of Detroit; and THE BOARD OF POLICE COMMISSIONERS, City of Detroit,
Defendants,

and

Case No.: 5-72264

GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON and ALFRED BROOKS,
Intervening Defendants.

JUDGMENT

In accordance with its previous opinions in this case, this Court acknowledges and expressly approves the following resolution adopted by the Board of Police Commissioners on December 20, 1979; and accordingly for purposes of clarity and understanding this Court recites the resolution in its entirety:

WHEREAS, the Board of Police Commissioners in July of 1974, made a finding in its public session that the Detroit Police Department had been guilty of unlawful racial discrimination in its hiring and promotional practices;

WHEREAS, the Board of Police Commissioners has received from the Department numerous documents and statistics that indicate the Department is still adversely affected by the effects of the past discrimination;

WHEREAS, the Board of Police Commissioners has received from the Chief of Police a written presentation outlining the reasonable goals and objectives of the Affirmative Action Plan;

WHEREAS, the Board of Police Commissioners has received numerous exhibits and documents from the Chief of Police showing the continued drastic underrepresentation of Blacks at the rank of sergeant and lieutenant;

WHEREAS, the Board of Police Commissioners is convinced that in order to improve its operational effectiveness in crime prevention and solution, that the number of Blacks at the ranks of sergeant and lieutenant be increased;

WHEREAS, the Board of Police Commissioners has determined that the Affirmative Action Plan, as proposed by the Chief of Police, is substantially related to the objective of remedying the effects of prior discrimination;

WHEREAS, the Board of Police Commissioners has received substantial evidence that the Affirmative Action Plan was substantially related to the objectives of improved law enforcement;

WHEREAS, the Board of Police Commissioners has determined that achieving the objectives of improved law enforcement;

WHEREAS, the Board of Police Commissioners has determined that achieving the objectives of remedying the effect of past discrimination require the implementation of certain promotional ratio;

WHEREAS, the Board of Police Commissioners has received substantial evidence and statistics tending to show that a 50/50 promotional ratio will improve the law enforcement capability of the Detroit Police Department;

WHEREAS, the Board of Police Commissioners has concluded that a 50/50 ratio is the most reasonable method of achieving the goal in order to insure promotional opportunity to all persons in the Detroit Police Department to the ranks of sergeant and lieutenant;

WHEREAS, the Board of Police Commissioners has concluded that the 50/50 ratio is the most reasonable means available to correct the harsh effects of past discrimination;

WHEREAS, the Board of Police Commissioners has concluded that the 50/50 ratio serves to enhance public safety by improving law enforcement;

WHEREAS, the Board of Police Commissioners has been assured by the Chief of Police that all persons recommended for promotion to the ranks of sergeant and lieutenant are substantially equally qualified to perform the job for which they are being selected;

WHEREAS, the Board of Police Commissioners wishes to adopt and incorporate by reference the written presentation of all exhibits, documents, minutes of its meeting wherein it deliberated the promulgation and adoption of this Plan;

WHEREAS, the Board of Police Commissioners has determined that the program as described and the Chief's recommendations will achieve the objectives as provided for in the written presentation in as fair a manner as possible for all concerned;

WHEREAS, the Board of Police Commissioners determines at this time that an end-goal of 50% Black officers at the ranks of sergeant and lieutenant is appropriate in order to meet the objectives of the Affirmative Action Plan subject to a radical shift of the demographic composition of the City of Detroit or some other unforseen factor that markedly alters the circumstances;

WHEREAS, development of a job related, validated and race-neutral promotional model is essential to barring discrimination in the future and, therefore, to achieving a termination of the Affirmative Action Plan;

WHEREAS, the Board of Police Commissioners is of the opinion that a job related, validated and racially-neutral promotional model for promotions to the ranks of sergeant and lieutenant is essential to the proper functioning of the Department;

WHEREAS, the Board of Police Commissioners has received legal advice from its counsel that the Affirmative Action Plan is lawful;

WHEREAS, the Board of Police Commissioners has been informed that it is under a legal obligation to remedy the effects of the Department's prior unlawful practices; and

WHEREAS, the Board of Police Commissioners has been assured by its counsel that there are no existing legal impediments to the adoption of the Affirmative Action Plan as described.

THEREFORE, BE IT RESOLVED BY THE BOARD OF POLICE COMMISSIONERS THAT:

1. The Chief of Police is authorized and instructed to take Affirmative Action to promote individuals from Personnel Orders 77-527 and 77-528, pursuant to the Affirmative Action Resolution adopted by this Board on July 31, 1974, and reaffirmed on December 28, 1976, August 4, 1977 and, also Section 7-114 of the Charter of the City of Detroit which permits the Chief of Police to pass over individuals on the eligibility register after the Chief of Police files, as he has done, written reasons acceptable to this Board.

BE IT FURTHER RESOLVED THAT:

2. An end-goal of 50% Black officers at the rank of sergeant and lieutenant is appropriate at this time in order to meet the objectives of the Affirmative Action Plan, subject to a radical shift of the demographic composition of the City of Detroit or some other unforseen factor that markedly alters the circumstances.

BE IT FURTHER RESOLVED THAT:

3. The Affirmative Action Plan for promotion to the ranks of sergeant and lieutenant will terminate when the end-goal is attained.

BE IT FURTHER RESOLVED THAT:

4. The Department is directed to develop, as soon as possible, a job related, validated and racially-neutral promotional model for the ranks of sergeant and lieutenant.

WHEREAS, this Court desires to adopt and approve that resolution through Order:

WHEREAS, this Court by adopting the resolution of the Board of Police Commissioners establishing the termination plan hereby approves of the promotional plan in the Detroit Police Department for promotions to the rank of lieutenant and until such end-goal is achieved.

THEREFORE:

IT IS HEREBY ORDERED AND ADJUDGED that the Board of Police Commissioners resolution establishing an end-goal of 50% Black officers at the rank of lieutenant is appropriate in order to meet the objectives of the Affirmative Action Plan and is consistent with this Court's Order previously entered October 1, 1979.

IT IS FURTHER ORDERED AND ADJUDGED that the method of promotion pursuant to Section 7-114 of the City Charter, is appropriate and consistent with this Court's ruling.

IT IS FURTHER ORDERED AND ADJUDGED that the Affirmative Action Plan for promotion to the rank of lieutenant will terminate when the end-goal is attained or until the further order of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that the Plan for continued implementation of the voluntary Affirmative Action Plan with the Detroit Police Department is hereby approved and that the City of Detroit, through the Detroit Police Department, is directed to continue implementation of the Plan in all respects and according to the Resolution.

IT IS FURTHER ORDERED AND ADJUDGED that the City of Detroit is directed to develop, as soon as possible, a job related, validated and racially-neutral promotional model for the rank of lieutenant.

IT IS FURTHER ORDERED AND ADJUDGED that the promotional system pursuant to the form described in the Resolution remain in full effect until its purposes are achieved or until the further Order of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that a Judgment shall be entered on behalf of all defendants and intervening defendants.

IT IS FURTHER ORDERED AND ADJUDGED that this Order supersedes any provision governing promotions from the rank of sergeant to lieutenant whether incorporated in an agreement between the parties or otherwise.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff Detroit Police Lieutenant's and Sergeant's Association pay the intervening defendant's reasonable attorney's fees.

IT IS FURTHER ORDERED AND ADJUDGED that each party will bear its own costs in this Court.

/s/ DAMON J. KEITH

Circuit Judge, sitting by designation as a district judge

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EASTERN DISTRICT OF MICHIGAN

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No. 83-551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, et al.,
Petitioners,

v.

CITY OF DETROIT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF IN OPPOSITION

STATEMENT

This case involves a challenge by certain white police officers and a union representing Detroit police sergeants and lieutenants to a comprehensive voluntary affirmative action program of the Detroit

Police Department (hereinafter "the DPD"). Petitioners' claim concerns the effect of the program on police officers who are seeking promotion from the rank of sergeant to lieutenant. (App. 2a). In 1980, some of the petitioners in this case and others petitioned this Court to review the DPD's program insofar as it affected police officers seeking promotion from the rank of police officer sergeant. The Court denied that petition. See Detroit Police Officers Assn. v. Young, 452 U.S. 938 (1981).

The affirmative action plan was adopted in July 1979 for the express purpose of remedying prior pervasive racial discrimination by the police department in its hiring and promotion policies.[1/] As stated by the Court of

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1/ One aspect of this remedy was to satisfy the DPD's operational needs for more black officers in all ranks. The

Appeals, "[t]he record is replete with evidence ... that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent, overt policy of discrimination against blacks in all phases of its operations." App. 16a. Affirmative measures were utilized only after less

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1/ continued

phrase "operational needs" describes the Detroit Police Department's need to restore good relations between the Department and Detroit's black community. The condition from which the Department's operational needs arose is a direct result of years of racially motivated exclusion of blacks from employment, racial strife between the police and black citizens, and neglect and abuse of black citizens. See App. 32a, n.44 and 219-20. The district court found that the "underlying cause" of poor police community relations in Detroit was the police department's attitude toward blacks." App. 224a. The court of appeals concluded that "[w]e are faced .. with a population that has been subjected to constitutional indignities as a direct result of the discriminatory practices which have created and maintained a white-dominated police force." (court's emphasis). App. 32, n.44.

drastic measures had failed to remedy the effects of prior discrimination, see pp. 21-2, infra.

The program was adopted by the Detroit Board of Police Commissioners ("the Board"). The Board, which is comprised of five civilian Detroit citizens who are appointed by the mayor with the approval of the City Council, is the entity which, under the Detroit City Charter, is charged with broad responsibility for establishing the policies, rules and regulations of the police department. (App. 149a). The Board reached its decision that affirmative measures are necessary to correct longstanding past discrimination after intense investigation and deliberation, including three formal administrative hearings which were open to the public.

The affirmative action program includes a variety of measures designed to enhance the employment opportunities for minorities in the police department and to increase minority participation at all levels. One aspect of the plan was a preferential system of hiring and promotion. Insofar as petitioners' claims are concerned, the means employed by the Board to remedy the racially discriminatory condition it found involves, inter alia, the promotion of fully qualified black and white officers on a one-to-one basis until the rank in question is approximately 50% black. The Board selected the 50% end-goal on the basis of evidence which revealed that as of the time of adoption of the program in 1974 the Detroit labor market for police officers was approximately 50% black. District Ct. Op., App. 242a; Trial exhibit 240 at pp. 14-15. The Board has

also declared that the program will terminate when that goal is attained. App. 242a.

In examining the plan's purposes and its underpinnings, the district court applied the "strict scrutiny" standard. (App. 205a). Having determined that the program was aimed at remedying identified racial discrimination, (App. 205-13a), the court went on to consider whether the means were closely related to that goal. (App. 213a-16a). It concluded that the one-for-one promotion ratio was appropriate in the circumstances but directed the Board to fix an end-goal. (App. 235a). The district court subsequently approved the end-goal fixed by the Board, App. 242a, and incorporated the Board's resolution into its Judgment. The Sixth Circuit affirmed the district court's determinations but vacated its Judgment insofar as it purported to

embody the Board's resolution into a court order. Accordingly, the affirmative action plan remains in effect pursuant to the powers the Board derives from the Detroit City Charter. App. 78a.

ARGUMENT

A. Introduction

Petitioners have presented four separate questions for review and have offered three reasons why the questions presented deserve full consideration by the Court. As we show below, none of the questions stated are presented under the facts of this case.

Moreover, the reasons advanced by the petitioners for granting the writ simply do not exist with respect to this case. The decisions below are clearly consistent with the governing decisions of this Court. There is no conflict among the

the circuits with regard to the issues for which review is sought. Furthermore, the issues raised are fact specific.

B. The Questions Stated In The Petition Are not Presented By The Facts Of This Case

In the first question, petitioners ask whether an affirmative action program which includes promotional ratios should be reviewed under a standard of "reasonableness," and accuse the courts below of applying such a test. However, it is clear that both the District Court, see p. 5, supra, and the Court of Appeals, see pp. 12-13, infra, applied the "strict scrutiny" test.

In the second question petitioners inquire whether a municipality may voluntarily adopt an affirmative action program which incorporates promotional ratios "where a collectively bargained non-discriminatory merit examination process

is already in place." See Pet. Brief, p. i. However, the courts below concluded that the selection process is discriminatory because it is not job related and it does not remedy the effects of prior discrimination. Thus, although the lieutenants' examination process when viewed in isolation did not disproportionately affect those blacks participating in the process, the severe adverse effects of the hiring and sergeant screening processes resulted in an "atypical pool" of candidates participating inthe lieutenant selection process. (App. 154-55a) The district court concluded that "many more blacks would have been present in all ranks, including that of lieutenant, had discriminatory practices not been followed." App. 156a.

In the third question, petitioners ask whether the percentage end-goal of such a

program should be pegged to the proportion of blacks in the general population as contrasted with the proportion of blacks in the relevant labor market. Petitioners' Brief, p. i. However, as discussed at pages 17-18, infra, the Chief of Police and the Board based their determination on what constitutes an appropriate percentage end-goal, in part, on the proportion of blacks in the relevant labor market.[3/]

The fourth question proceeds from an assumption that all discriminatory practices have ceased and that what remains to be redressed is the impact of long-ended discrimination against the black population generally. Neither the Board nor the courts below agreed with petitioners that all discriminatory practices and their

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3/ The factors on which the end-goal was fixed are set forth in a December 6, 1979 presentation of the Chief of Police to the Board and are summarized at p. 18, infra.

effects had been eliminated.[4/] Moreover, neither the Board nor the courts below were able to agree with petitioners that the operational needs of the DPD involves wrongs against black citizens which had all occurred "many years earlier." See Pet. Brief, p. i. These wrongs were occurring up through the time the Board adopted the affirmative action policy, see 219a-228a, and the consequences of those wrongs were being felt at the time of trial. See App. 227a. Finally, the Board's determination to continue the program after 1979[5/] was

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4/ Petitioners contended that such practices were remedied at the rank of lieutenant approximately two years after adoption of plan. See App. 74a. The Board and the district court concluded, on the basis of the evidence before them, that it would take a substantially longer period to effectuate a complete remedy. See Ex. 240 and 242 and App. 242a.

5/ The Board fixed an end-goal for the program in December 1979 following the district court decision on liability.

not based solely on operational needs considerations. See Ex. 240 and App. 238a-42a. Accordingly, the fourth question is not presented by the facts of this case.

C. The Reasons Offered For Granting The Writ Are Inapposite

1. The Decisions Below Are Clearly Consistent With The Governing Principles Set Forth in Bakke and Fullilove

Petitioners claim that the decisions below conflict "in principle" with Bakke, Weber and Fullilove and that they "squarely collide with the principle that the nature of the violation determines the scope of the remedy." See Pet. Brief, p. 14. Petitioners have accused the lower courts of failing to apply the "strict scrutiny" test. This accusation is unsupportable in view of the Sixth Circuit's unambiguous statement that the "strict scrutiny"

standard applies. Judge Jones wrote:

> At the outset, we note that the standard [to be applied] is one which does apply strict scrutiny.

App. 11a. Following the counsel of Chief Justice Burger in Fullilove, 448 U.S. at 491, the circuit court proceeded to apply "the most searching examination" of the plan. Id. It concluded that the Board's affirmative action program was, in fact, a remedial program, designed specifically to remedy identified unlawful racial discrimination and that the remedial means employed were appropriate in light of the plans' objectives. In applying these standards the Sixth Circuit relied specifically on this Court's decisions in Bakke and Fullilove. See App. 13a.

The Court has consistently affirmed that racial preferences in hiring and promotion are permissible under the Fourteenth Amendment to remedy past discrimi-

nation by the employer. Five members of the Court agreed in Bakke that race conscious remedies are appropriate for proven discrimination. 438 U.S. at 301 (Powell, J.); id. at 353 & n.28 (Brennan, White, Marshall & Blackmun, J.J.). Courts of appeals' decisions approving race conscious hiring remedies by governmental employers have been cited with approval. E.g., Fullilove, 448 U.S. at 510 (Powell, J.).

Moreover, the fact that Detroit's affirmative action program was adopted voluntarily, rather than imposed by a court, does not render it unconstitutional. A majority of the Court has concluded that race conscious remedies are appropriate where there have been "judicial, administrative or legislative findings of constitutional or statutory violations." Fullilove, 448 U.S. at 497 (Powell, J.); Bakke, 438 U.S. at 307 (Powell, J.); id. at 366,

n.42 (Brennan, White, Marshall & Blackmun, J.J.). In this case, an administrative body and two courts have found massive intentional past discrimination.

The scope of the race conscious adopted by the Board clearly is appropriate in the circumstances of this case. The Board found that the exclusion of and discrimination against blacks by the Police Department had been longstanding, blatant and pervasive. In this situation, a strong remedy is required.

Petitioners' major complaint about the promotion program is the end goal of 50% black representation at the lieutenant level. Focusing on the number of black sergeants in the Department as of June 1978, petitioners argue that in the absence of discrimination blacks would have comprised only 25 percent of the total number

of lieutenants. However, petitioners ignore the fact that the City's prior discrimination in hiring and promotion resulted in severe underrepresentation of blacks in the sergeant position. This is not a case, as petitioners' contend, where the remedial goal was pegged to general population percentages, rather than to the appropriate labor market. Rather, because blacks had been discriminatorily excluded from the sergeant pool, the most reliable method of estimating the labor pool that would have existed in absence of prior discrimination involved use of labor market percentages.

The Board adopted the affirmative action program and subsequently fixed a 50% end-goal following careful examinations of Detroit's experience with racial discrimination within the DPD, the consequences of that discrimination on black applicants and

employees and on black citizens, and evidence of the probable racial composition of the DPD absent discrimination. The Board's decisions with respect to overall policy and implementation were made only after it had conducted a series of public sessions in which it invited and received the views of interested individuals and groups.[9/] The factors which led the Board to select a 50% end-goal may be summarized as follows:

a. The Department's discriminatory hiring practices did not end until after 1974.

b. The Department's best estimate is that the relevant labor market was approximately 50% black in 1974.

9/ Petitioners' counsel participated in those sessions but declined to offer evidence of what he believed would be an appropriate end-goal. See App. 236 and Ex. 342, p. 12.

c. The recognition that absent discrimination the ranks of sergeant and lieutenant would be more than 50% black given the higher propensity of black officers to apply and if hired to remain with the Department longer than their white counterparts.

d. The belief that adoption of a 50% end-goal would signal the community that the Department was irrevocably committed to substantial change from the past.

See Ex. 240, pp. 14-15.[10/]

2. There Is No Conflict Among The Circuits

Petitioners contend that conflicts among the circuits exist with respect to

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10/ Petitioners also criticize what they view as an absence of procedural safeguards to assure that the program is specifically tailored to serve a compelling state interest. In doing so they have ignored the Board's practice of holding extended public meetings each time important policy questions are considered. They refer instead to the procedures which are available for review of individual grievances under §7-1114 of the Detroit City Charter. The Board refused to review its policy determination under this procedure.

three different aspects of the rulings below. Petitioners misconstrue both the decisions of other courts and the decisions below in a futile attempt to support such an assertion.

The courts of appals are unanimcus in their approval of racial preferences in hiring and promotion as a remedy for past discrimination. Petitioners can cite no decision holding otherwise. Instead, petitioners focus on the scope and extent of the remedial plans approved by the lower federal courts. Because the scope of the remedy is detrmined by the nature and extent of the violation,the outcomes of individual cases will necessarily differ, reflecting the particular circumstances of those cases.[8/]

8/ For example, the question of race conscious remedies in employment may arise in the context of a remedial court order which was bottomed on a non-pervasive pattern of

8 / continued

unlawful racial discrimination, see Kirkland v. N.Y.S. Dept. of Correctional Services, 520 F.2d 420 (1975); in the context of a consent decree, which for a relatively short period of time provided certain employment advantages to minorities and women, see EEOC v. A.T. & T., 556 F.2d 167 (3d Cir. 1977); or in the context of judicial findings of pervasive patterns of racial discrimination in employment, see United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) and F.I.R.E. v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980).

Petitioners comparison, as an example of the "confusion and conflict" which they say exists, of the alleged durational difference between the remedial order in NAACP v. Allen, 394 F.2d 614, 621 (5th Cir. 1974) and the plan approved by the district court in this case, is illustrative. See Pet. Brief, p. 13. In the former case the Fifth Circuit required that the race conscious hiring order for the Alabama highway patrol "spend itself" when black officers constitute 25% of that employer's workforce. The court reported that according to the 1970 census, blacks constituted 26.29% of the Alabama population. See 394 F.2d at 617, n.3. In the latter case, the district court approved the Detroit Board of Police Commissioners plan which fixed a 50% end-goal. The Board based its determination in part on the fact that blacks constituted 50% of the relevant

Petitioners also contend that the decisions below failed to consider whether less harmful alternatives would cure the discrimination, and thus are in conflict with decisions in other circuits. Petitioners ignore the fact that the Sixth Circuit explicitly requires "a showing that no other approach offers a practical means of achieving the ends of the program

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8 / continued

labor market. Thus, both plans designed to be temporary measures which will "spend" themselves when black representation approaches parity with the representation of blacks in the relevant population.

Similarly, petitioners cite the Second Circuit's decision in Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (1975) as disapproving of the use of race conscious remedies affecting promotions. However, as noted above, see pp. 19-20, Kirkland merely concluded that the remedy was not appropriate in the facts of that case. Moreover, in a different, more recent case involving the same plaintiff, the Second Circuit expressly approved the use of a race conscious promotion remedy. Kirkland v. N.Y. State Dept. of Correc. Services, 711 F.2d 1117, 1134 (1983).

in the foreseeable future," Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 694 (1979), and that the City of Detroit had tried less drastic measures which did not succeed. App. 113a-123a.

3. The Issues Raised Are Fact Specific

Petitioners also offer that this case presents a fully developed record for the Court to decide questions relating to the remedial use of racial preferences in public employment. However, as discussed above, the appropriateness of the remedial use of such racial preferences is entirely dependent on the circumstances of the particular case. The general principles governing such preferences have been established by the Court's prior decisions and the unanimous conclusion of the courts of appeals. In essence, petitioners' claim is a factual one -- that the Board of Commissioners improperly computed the appropriate

labor market in setting the end-goal. The district court and court of appeals have reviewed this factual claim and found it to be erroneous.

The record in this case is quite substantial. (See App. 94a-95a). However its very size and complexity illustrates why this is not an appropriate case for review of the issues petitioners seek to present. The problems and consequences of unlawful racial discrimination which Detroit faces are enormously complex. Few cities may face problems as complex and as intractible was the experience of Detroit. Certainly, few will reach a point, such as that facing Detroit in 1974, when it had to admit publicly the existence of pervasive patterns of unlawful discrimination and begin to address directly "the ongoing crisis in relations between the (police) Department and the black community." (App. 22la.). Accordingly, a deci-

sion in this case may have little application elsewhere.

Petitioners also contend that this case presents "pervasive issues of vital national concern." Pet. Brief, p. 9. Respondents agree that the issue of how to remedy longstanding and pervasive employment discrimination is important. However, as discussed above, the governing principles are already well-established, and petitioners' main concern seems to be the factual application of those principles. Petitioners' reliance on a Report of the United States Civil Rights Commission and a certification by the United States Attorney General is misplaced.

One searches the page cited the in Civil Rights Commission report in vain for the reference quoted by petitioners. See U.S. Commission on Civil Rights, Affirmative Action in the 1980's Dismantling the

Process of Discrimination 28 (1981). The Commission report does indicate the existence of some remaining questions regarding the standards governing affirmative action, but it reports that this Court's affirmative action cases "shows strong commitment to affirmative action measures designed to eliminate all forms of discrimination..." Id. We observe that petitioners have neglected to report that the same Commission publication noted that the circuit courts are unanimous in the view that the use of race conscious measures as a means of remedying prior discrimination in employment, including municipal employment, is permissible. Id., pp. 28-9.

The Certificate of Public Importance issued by the Attorney General is concerned exclusively with an interpretation of the power of a district court under § 706(g) of Title VII of the Civil Rights Act of 1964,

as amended, 42 U.S.C. §2000e et seq., to order race conscious remedies. (App. 46a). The Sixth Circuit vacated the final order of the district court. (App. 78a). Accordingly, this case no longer presents issues relating to the reach of § 706(g) and Attorney General's certificate to which petitioners have referred is of no relevance to this case in its present posture.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should be denied.

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83-551

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, individually and on behalf of all others similarly situated; and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,

Petitioners,

vs.

CITY OF DETROIT, a Michigan Municipal Corporation; COLEMAN A. YOUNG, Mayor; WILLIAM L. HART, Chief of Police; DETROIT BOARD OF POLICE COMMISSIONERS; and GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON, ALFRED BROOKS,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This brief as an amicus curiae is submitted on behalf of the Saint Paul Police Federation in support of the Petition for Writ of Certiorari with the written consent of all the parties. The letters consenting to the filing of the brief have been filed in the office of the Clerk.

The Saint Paul Police Federation is the exclusive bargaining agent for the sworn members of the police department for the City of Saint Paul, Minnesota. The Federation collectively represents 490 officer members holding the ranks of Patrol Officer, Sergeant, Lieutenant and Captain. The hiring and promotion of these officers is regulated through the auspices of the City of Saint Paul's personnel department under the structure of a meritorious civil service system.

In Saint Paul, Minnesota, as elsewhere across the nation, public employers are seeking guidance in adopting affirmative action programs created to remedy past discriminatory practices in the hiring and promoting of their employees. The issues presented in *Bratton, et al vs. City of Detroit, et al* grant to this Court a unique opportunity to address this concern and to provide definitive guidelines and direction to an area, which to date, has been riddled with overriding confusion and ambiguity. In order that such concerns may be adequately and equitably addressed by the lower courts of this nation, guidance and direction which is available only through this Court must be provided.

The impact of this Court's decision to grant certiorari in this case or to not grant certiorari will have a profound influence on affirmative action programs adopted in communities all across the United States for years to come. The Court's decision will determine whether the state of confusion presently existing shall continue or whether a clear direction will be established.

Specific issues which this Court will have a clear opportunity to address are:

1. to what extent should the existence of past discrimination be established prior to the implementation of a racially preferenced affirmative action program;

2. in promotional advancements as well as initial hirings by governmental agencies, is it proper to base preferential quotas on the proportion of minorities in the community as a whole or should preferential treatment be based on the qualified applicants who realistically meet the demands of the relevant labor market;

3. is it proper to consider factors outside the specific harms caused by past discrimination in attempting to correct the injuries to specific individuals, i.e., should consideration be given to the discrimination effectuated against the community as a whole by the governmental agency involved in addition to the specific direct injury to individuals;

4. to what extent is it proper to grant racial preference to individuals not specifically injured and to likewise impose reverse discrimination and stigmatization upon members of the labor force who have not actively discriminated against the minority population as a whole, or directly against the specifically injured minority members of the relevant labor force;

5. prior to the implementation of rigid racially based quotas, should a governmental employer attempt to remedy past injustices through the implementation of less restrictive means;

6. what basis should the imposing governmental entity use in determining the length of time during which a racially based preference should be granted to minorities as a remedial measure.

The instant case offers many significant and controversial issues which remain unresolved since the adoption of af-

firmative action programs by public employees throughout the United States. Therefore, it is respectfully urged that this Court grant certiorari to this case, ultimately resolve the issues presented and provide the needed definitive guidelines for the establishment and maintenance of affirmative action programs by public employers.

Dated: October 25, 1983.

Respectfully submitted,

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No. 83-551

In the Supreme Court of the United States

OCTOBER TERM, 1983

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vs.

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Respondents.

Brief of State Labor Council and Michigan State Lodge — Fraternal Order of Police as Amici Curiae in Support of Granting the Writ

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QUESTION PRESENTED

I. WHETHER A MUNICIPAL GOVERNMENT AS A PUBLIC EMPLOYER, ACTING WITHOUT THE BENEFIT OF LEGISLATIVELY-DEFINED CRITERIA, IS COMPETENT TO MAKE "FINDINGS" OF PAST DISCRIMINATION AND ENACT UNILATERAL "REMEDIES" IRRESPECTIVE OF STATE LAW COLLECTIVE BARGAINING REQUIREMENTS.

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Respondents.

BRIEF AMICI CURIAE — STATE LABOR COUNCIL AND MICHIGAN STATE LODGE — FRATERNAL ORDER OF POLICE

STATEMENT OF INTEREST

Amicus Fraternal Order of Police, Michigan State Lodge, is a voluntary association which was organized pursuant to the laws of Michigan, chartered in 1939, and presently consists of approximately 10,700 members most of whom are involved in law enforcement occupations. The Michigan Lodge has

representation in every field of law enforcement activity and its members are employed at every level of state, county and local law enforcement.

Amicus Fraternal Order of Police, State Labor Council, is the recognized collective bargaining agent for approximately 3,500 law enforcement officers, representing approximately two hundred fifty collective bargaining units throughout Michigan. Most of the members of the Labor Council perform police functions and/or are police officers and, as such, are subject to 1969 PA 312 — Compulsory Arbitration of Labor Disputes in Municipal Police and Fire Departments. The State Labor Council has represented several hundred employees in numerous Act 312 proceedings and continues to do so at the present time. Many public employees — police officers — are working at this time under collective bargaining agreements achieved as a result of Act 312 arbitration.

The parties have given their consent to the filing of this amici curiae brief; the letters of consent are on file.

REASONS FOR GRANTING THE WRIT

PROLOGUE

Petitioners, in the District Court, asserted that the City acted improperly in unilaterally implementing racial quotas for promotion in derogation of both the substantive provisions of the applicable collective bargaining agreement[1] and the Michigan statutory prohibition against unilateral changes in

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[1] Petitioners argued that the City had violated the substantive agreement in that §7-1114 of the Detroit City Charter, requiring merit examinations for promotions, was specifically incorporated into the agreement.

promotional standards and criteria being terms and conditions of employment as defined in the Michigan Public Employment Relations Act (PERA)[2].

In its memorandum opinion, the District Court deemed these pendent state claims irrelevant since they were strictly a subject of state law and thus, subject to proceedings in state court. Appendix to Petition (hereinafter App.) at 194a, n.102. Paradoxically then, the District Court incorporated the promotional quota into a judicial decree that specifically "supercedes any provision governing promotions from the rank of sergeant to lieutenant whether incorporated in an agreement between the parties or otherwise." (App. at 261a). Thus, while the Court purported to ignore Petitioners' pendent state law claims, it simultaneously decided the issue, thereby effectively foreclosing the enforcement of Petitioners' state law rights to engage in collective bargaining.

Although the Court of Appeals affirmed the District Court's final order insofar as it operated to retain jurisdiction over the operation of, and changes in, the affirmative action plan, it rejected the District Court's decision to protect the plan by incorporating it into the final judgment. (App. 79a). Thus, although without expressly stating so, the Court of Appeals ostensibly restored Petitioners' state law collective bargaining rights when it vacated the District Court's final judicial order. (App. 78a).

Nonetheless, the Court of Appeals affirmed in all other respects the statements of law decided below, including the holding that municipal employers possess a broad "area of discretion" to design and implement "voluntary" affirmative action programs. (App. 192a). The decisions below, therefore, embrace the proposition that a municipal government is

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[2] Mich. Comp. Laws Ann. (MCLA) §432.201, *et seq.*; Mich. Stat. Ann. (MSA) §17.555(1), *et seq.*

competent to make valid findings of past discrimination as well as to unilaterally implement racial preferences as a remedy for past discrimination irrespective of the collective bargaining process. The Amici submit that this disturbing precedent wrongly confers an "area of discretion" upon municipal governments which is specifically denied by the carefully structured provisions of PERA designed to guard against the arbitrary actions of public employers by prohibiting unilateral changes in terms and conditions of employment.

As such, the decisions below cast into doubt the parameters of collective bargaining in the Michigan public employment sector. Indeed, the Court of Appeals' decision may be read to carve out an affirmative action exception to PERA, thus threatening public employees' state law collective bargaining rights.

Given the existing confusion among the circuits in this area,[3] and the corresponding lack of definitive guidelines from this Court, the Amici submit that this Court should grant the Writ herein and define the parameters of discretion to be accorded municipalities in enacting affirmative action programs as a purported remedy for past discrimination.

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[3] *See* Petition for Writ of Certiorari, pp. 11-13.

I.

UNLIKE THE ACT OF CONGRESS INVOLVED IN *FULLILOVE*, THE DETROIT BOARD OF POLICE COMMISSIONERS IS A PUBLIC ENTITY INCOMPETENT TO MAKE VALID FINDINGS OF PAST DISCRIMINATION AND IS PROHIBITED UNDER MICHIGAN LAW FROM UNILATERALLY IMPLEMENTING PURPORTED REMEDIES FOR PAST DISCRIMINATION.

Municipal employers in Michigan are specifically prohibited from, and rendered incompetent, to create and implement unilateral decisions regarding "terms and conditions of employment" as that term is defined under PERA.[4]

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[4] The Michigan Constitution of 1963 explicitly authorizes the legislature to enact laws governing public employment. ("The legislature may enact laws providing for the resolution of disputes concerning public employees . . ." MICH. CONST., art. 4, §48.) Pursuant to that authority, the legislature enacted PERA to provide public employees the absolute right to form and join labor organizations, and to collectively bargain in good faith with public employers regarding "wages, hours and other terms and conditions of employment". MCLA 423.215; MSA 17.455(15). The Michigan Supreme Court has repeatedly recognized that §15 of PERA was modeled after §8(d) of the National Labor Relations Act, 29 USC 158(d), and that the language of the two sections is virtually identical. Accordingly, Michigan cases have customarily followed the federal interpretations of parallel Michigan provisions. *See, e.g., Central Michigan University Faculty Association v Central Michigan University*, 404 Mich 268, 273 NW 2d 21 (1978); *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 233 NW 2d 49 (1975). In federal labor relations law, seniority, promotion, and promotional criteria are included within the phrase "other terms and conditions of employment". *See Ford Motor Company v Huffman*, 345 US 330 (1953). Seniority, promotions and promotional criteria, being included within the statutory phrase "other terms and conditions" are thus, mandatory subjects of bargaining. *Local 1383, International Association of Fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642; 311 NW 2d 702 (1981). Consequently, a refusal to bargain over affirmative action promotions constitutes an unfair labor practice under §10(e) of PERA. MCLA 423.210(e); MSA 17.455(10)(e).

In fact, the Michigan Supreme Court has consistently held that PERA's express prohibition against unilateral public employer actions must prevail over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the Constitution carve out exceptions to PERA. *Local 1383, International Association of Firefighters, AFL-CIO v City of Warren*, 411 Mich 642, 655; 311 NW 2d 702 (1981).

The Michigan courts have squarely held that all promotional standards and criteria constitute a "term and condition of employment" as defined in PERA, with its mandatory duty to bargain and its attendant prohibition against unilateral employer actions. *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 233 NW 2d 489 (1975); *accord*, *Local 1383*, *supra*. Therefore, contrary to the decisions below in the instant case, the City of Detroit and the Board of Police Commissioners have no "area of discretion" to unilaterally implement purported remedies for past discrimination by altering promotional standards and criteria to include the use of race.

As Justice Powell cogently observed in *University of California Regents v Bakke*, 438 US 265, 309 (1978), "isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." *See also Fullilove v Klutznick*, 448 US 448, 472-80 (1980).

The City of Detroit and its Board of Police Commissioners has no such mandate or criteria and, as evidenced by the facts of the instant case, is totally unsuited, in the absence of such

criteria, to make the "findings" it did and purport to remedy past discrimination based on those "findings".[5]

Similarly, the decisions below contrast sharply with the Equal Employment Opportunity Commission (EEOC) affirmative action guidelines which recognize that modification of promotion procedures is a matter properly entrusted to the collective bargaining process. 29 CFR §1608.3(c)(4). This Court has recognized that "[t]he collective bargaining process 'lies at the core of our national labor policy . . .'" *American Tobacco Company v Patterson*, 456 US 63, 76 (1982), *citing Transworld Airlines, Inc v Hardison*, 432 US 63, 79 (1977); *Accord, United Steelworkers of America v Weber*, 443 US 193 (1979).[6]

Thus, while the decisions below purport to apply the teachings of *Weber*, *supra*, the courts below glossed over the role of the collective bargaining agreement which constituted the voluntary affirmative action plan upheld in *Weber*, 443 US at 197. If anything, *Weber* stands for the proposition that employers and unions may (at least in the private sector) join

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[5] Aside from general population charts and graphs presented by the Chief of Police, the Board held a single public hearing at which a number of individuals related instances of discrimination involving the Detroit Police Department. Although the Detroit City Charter vested the Board with the power to subpoena witnesses, administer oaths and require production of evidence, the Board did not exercise any of these powers (J.A. 587-88), and made no attempt to verify the various incidents of past discrimination described by members of the audience. (J.A. 1131-33).

[6] To that end, this Court has frequently reaffirmed its adherence to the policy favoring minimum governmental intervention in collective bargaining. *California Brewers Association v Bryant*, 444 US 598, 608 (1980). The decisions below can only serve to denegrate this sound policy.

together in formulating appropriate affirmative action policies which advance and protect the interests of *all* employees.[7]

If allowed to stand, the decision below sets a disturbing precedent for the proposition that municipal governments are competent to make valid findings of discrimination and may unilaterally implement "remedies" based on those "findings" in the absence of legislative standards, and in derogation of the collective bargaining process. The decisions below, therefore, threaten the collective bargaining process in the public sector and contravene the strong national policy favoring a minimum of governmental intrusion in collective bargaining, espoused in *American Tobacco, supra.*

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[7] In 1968, the Michigan legislature, in an era of public employee strikes, determined that it would be appropriate to withhold from police officers and firefighters the opportunity to strike with a compulsory arbitration statute. Accordingly, the Michigan legislature enacted Act 312, MCLA 423.231, *et seq.*; MSA 17.455(31), *et seq.* Act 312 seeks to accomplish its purpose — "an alternative, expeditious, effective and binding procedure for the resolution of [interest] disputes" — through the creation of a final and binding compulsory arbitration scheme derived from the broad constitutional grant of authority in MICH. CONST. art. 4, §48. Binding arbitration under Act 312 is composed of a number of discrete, legislatively described phases and procedural safeguards. (e.g., such matters as evidentiary guidelines, subpoena powers, a requirement of written findings of fact, and a mandatory written opinion and order.) MCLA §423.236-.238; MSA §17.455(36)-.455(38).

II.

THERE EXISTS A STRONG NEED FOR THIS COURT TO SET FORTH APPROPRIATE STANDARDS AND GUIDELINES OUTLINING THE PERMISSIBLE USE OF AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT.

Amicus, Fraternal Order of Police, State Labor Council, is the exclusive bargaining agent for approximately three thousand, five hundred (3,500) law enforcement officers throughout the state, representing approximately two hundred fifty (250) collective bargaining units. The administration of these labor contracts includes all matters concerning "wages, hours and other terms and conditions of employment". PERA, *supra*. Included within this area of responsibility is the often delicate problem of affirmative action as it impacts upon terms and conditions of employment.[8]

Amicus is increasingly confronted with the question of affirmative action as it relates to the administration and negotiation of collective bargaining agreements. While this Court in *Weber, supra,* recognized that affirmative action is a proper subject of collective bargaining (at least in the private sector), this question must of necessity be dealt with in a vacuum absent definitive guidelines and criteria from this Court.

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[8] Under both PERA and Act 312, the Michigan legislature has determined the collective bargaining system to be most appropriate for public employers and their employees to negotiate regarding terms and conditions of employment. Moreover, the give and take of the collective bargaining process is capable of producing a creative alternative to any quota that would satisfy the constitutional demands to remedy past discrimination. Thus, in stark contrast to the necessarily unregulated, informal determination capable of being made by the municipal government as employer, through its Board of Police Commissioners, Act 312, through its express and detailed standards, is considerably more conducive to accurate and qualified determinations.

Amici submit that the instant case provides the factual background and offers the Court the basis and opportunity for a proper and decisive decision in this area. A definitive decision from this Court will not only limit the power of municipal government to discriminate on the basis of race, but may also provide appropriate guidelines for the incorporation of appropriate affirmative action programs into collective bargaining agreements. The absence of such guidelines commend themselves to granting the Writ in this case.

CONCLUSION

The decisions below erroneously confer an "area of discretion" on municipal employers to unilaterally implement racial quotas for police promotions without any of the requisite safeguards against arbitrary action. As a public employer, a municipal government which acts without the benefit of legislatively defined criteria is, and shall be, considered incompetent to make valid findings of discrimination, and to unilaterally implement purported "remedies" for such discrimination in the form of racial quotas. Yet, in the absence of definitive guidance from this Court, the decisions below stand as the state of the law in this area and threaten the creative input of the collective bargaining process as it impacts on permissible affirmative action. These reasons, among others, commend granting the Writ.

Respectfully submitted,

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State Labor Council and Michigan
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(Rogue Tyson on Brief)

PUBLIC EMPLOYMENT RELATIONS ACT

AN ACT to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act.

The People of the State of Michigan enact:

423.201 Definitions; rights of public employees.

Sec. 1. As used in this act:

(a) "Strike" means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment. This act shall not be construed to limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(b) "Commission" means the employment relations commission as created in section 3 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.3 of the Michigan Compiled Laws.

423.202 Public employee; definition; strike prohibited.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions

thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

423.203 Public employees; persons in authority approving or consenting to strike prohibited; participating in submittal of grievance.

Sec. 3. No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7.

423.204a Application of act to state civil service employees.

Sec. 4a. The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof.

423.205 Repealed. 1965, p. 750, Act 379, Imd. Eff. July 23.

423.206 Public employee; conduct deemed strike; proceeding to determine violation of act; time; decision, review.

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights,

privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

423.207 Request for mediation of grievances; powers of commission; notice of status of negotiations; appointment of mediator.

Sec. 7. (1) Upon the request of the collective bargaining representative defined in section 11 or, if a representative has not been designated or selected, upon the request of a majority of any given group of public employees evidenced by a petition signed by the majority and delivered to the commission, or upon request of any public employer of the employees, the commission forthwith shall mediate the grievances set forth in the petition or notice, and for the purposes of mediating the grievances, the commission shall exercise the powers and authority conferred upon the commission by sections 10 and 11

of Act No. 176 of the Public Acts of 1939, as amended, being sections 423.10 and 423.11 of the Michigan Compiled Laws.

(2) At least 60 days before the expiration date of a collective bargaining agreement, the parties shall notify the commission of the status of negotiations. If the dispute remains unresolved 30 days after the notification on the status of negotiations and a request for mediation is not received, the commission shall appoint a mediator.

423.209 Public employees forming or joining labor organizations; collective bargaining.

Sec. 9. It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

423.210 Prohibited conduct; service fee.

Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; (b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining

unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative; (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act; or (e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11.

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

(3) It shall be unlawful for a labor organization or its agents (a) to restrain or coerce: (i) public employees in the exercise of the rights guaranteed in section 9: Provided, That this subdivision shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (ii) a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances; (b) to cause or attempt to cause a public employer to discriminate against a public employee in violation of subdivision (c) of subsection (1); or (c) to refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

423.211 Public employees; designation of bargaining representatives; grievances of individual employees.

Sec. 11. Representatives designated or selected for purposes of collective bargaining by the majority of the public

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

423.212 Collective bargaining representative; petition; investigation; notice; hearing; election by secret ballot; certification of results; consent election.

Sec. 12. When a petition is filed, in accordance with rules promulgated by the commission:

(a) By a public employee or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose wish to be represented for collective bargaining and that their public employer declines to recognize their representative as the representative defined in section 11, or assert that the individual or labor organization, which is certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11; or

(b) By a public employer or his representative alleging that 1 or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 11; The commission shall investigate the petition and,

if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the commission finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules of the commission.

423.213 Decision as to appropriate collective bargaining unit; supervisor of fire fighting personnel.

Sec. 13. The commission shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining as provided in section 9e of Act No. 176 of the Public Acts of 1939, as amended, being section 423.9e of the Michigan Compiled Laws: Provided, That in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor.

423.214 Elections; eligibility to vote; rules; runoff election; effect of collective bargaining agreement.

Sec. 14. An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, where none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. An election shall not be

directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration. A collective bargaining agreement shall not bar an election upon the petition of persons not parties thereto where more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

423.215 Collective bargaining; duties of employer and employees' representative; subjects and limitations.

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

423.216 Violations of §423.210 as unfair labor practices; remedies; procedures.

Sec. 16. Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission in the following manner:

(a) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the commission, or any agent designated by the commission for such purposes, may issue and cause to be served upon the person a

complaint stating the charges in that respect, and containing a notice of hearing before the commission or a commissioner thereof, or before a designated agent, at a place therein fixed, not less than 5 days after the serving of the complaint. No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge. Any complaint may be amended by the commissioner or agent conducting the hearing or the commission, at any time prior to the issuance of an order based thereon. The person upon whom the complaint is served may file an answer to the original or amended complaint and appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the commissioner or agent conducting the hearing or the commission, any other person may be allowed to intervene in the proceeding and to present testimony. Any proceeding shall be conducted pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.271 to 24.287 of the Michigan Compiled Laws.

(b) The testimony taken by the commissioner, agent, or the commission shall be reduced to writing and filed with the commission. Thereafter the commission upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as

will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the commission is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the commission shall state its findings of fact and shall issue an order dismissing the complaint. No order of the commission shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. If the evidence is presented before a commissioner of the commission, or before examiners thereof, the commissioner, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the commission, and if an exception is not filed within 20 days after service thereof upon the parties, or within such further period as the commission may authorize, the recommended order shall become the order of the commission and become effective as prescribed in the order.

(c) Until the record in a case has been filed in a court, the commission at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any findings or order made or issued by it.

(d) The commission or any prevailing party may petition the court of appeals for the enforcement of the order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction of the proceeding and shall summarily grant such temporary or permanent relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting

aside in whole or in part the order of the commission. No objection that has not been urged before the commission, its commissioner or agent, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If either party applies to the court for leave to present additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to present it in the hearing before the commission, its commissioner or agent, the cou may order the additional evidence to be taken before the commission, its commissioner or agent, and to be made a part of the record. The commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modifying or new findings, which findings with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the supreme court in accordance with the general court rules.

(e) Any party aggrieved by a final order of the commission granting or denying in whole or in part the relief sought may within 20 days of such order as a matter of right obtain a review of the order in the court of appeals by filing in the court a petition praying that the order of the commission be modified or set aside, with copy of the petition filed on the commission, and thereupon the aggrieved party shall file in

the court the record in the proceeding, certified by the commission. Upon the timely filing of the petition, the court shall proceed in the same manner as in the case of an application by the commission under subsection (d), and shall summarily grant to the commission or to any prevailing party such temporary relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the commission. The findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If a timely petition for review is not filed under this subdivision by an aggrieved party, it shall be conclusively presumed that the commission's order is supported by competent, material, and substantial evidence on the record considered as a whole, and the commission or any prevailing party shall be entitled, upon application therefor, to a summary order enforcing the commission's order.

(f) The commencement of proceedings under subdivisions (d) or (e) shall not, unless specifically ordered by the court, operate as a stay of the commission's order.

(g) Petitions filed under subdivisions (d) and (e) shall be heard expeditiously by the court to which presented, and for good cause shown shall take precedence over all other civil matters except earlier matters of the same character.

(h) The commission or any charging party shall have power, upon issuance of a complaint as provided in subdivision (a) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority, for appropriate temporary relief or restraining order, in accordance

with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper.

(i) For the purpose of all hearings and investigations, which in the opinion of the commission are necessary and proper for the exercise of the powers vested in it under this section, the provisions of section 11 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.11 of the Michigan Compiled Laws, shall be applicable, except that subpoenas may issue as provided in section 11 without regard to whether mediation shall have been undertaken.

(j) The labor relations and mediation functions of this act shall be separately administered by the commission.

COMPULSORY ARBITRATION

AN ACT to provide for compulsory arbitration of labor disputes in municipal police and fire departments; to define such public departments; to provide for the selection of members of arbitration panels; to prescribe the procedures and authority thereof; and to provide for the enforcement and review of awards thereof.

The People of the State of Michigan enact:

423.231 Compulsory arbitration in police and fire departments; policy.

Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

423.232 "Public police and fire departments," "emergency medical service personnel," and "emergency telephone operator" defined; provisions inapplicable to certain persons.

Sec. 2. (1) Public police and fire departments means any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department.

(2) Emergency medical service personnel for purposes of this act includes a person who provides assistance at dispatched or observed medical emergencies occurring outside a recognized medical facility including instances of heart attack, stroke, injury accidents, electrical accidents, drug overdoses, imminent childbirth, and other instances where there is the possibility of death or further injury; initiates stabilizing treatment or transportation of injured from the emergency site; and notifies police or interested departments of certain situations encountered including criminal matters, poisonings, and the report of contagious diseases. Emergency telephone operator for the purpose of this act includes a person employed by a police or fire department for the purpose of relaying emergency calls to police, fire, or emergency medical service personnel.

(3) This act shall not apply to persons employed by a private emergency medical service company who work under a contract with a governmental unit or personnel working in an emergency service organization whose duties are solely of an administrative or supporting nature and who are not otherwise qualified under subsection (2).

423.233 Initiation of binding arbitration proceedings; request.

Section 3. Whenever in the course of mediation of a public police or fire department employee's dispute, except a dispute concerning the interpretation or application of an existing agreement (a "grievance" dispute), the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties may agree, the employees or employer may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the employment relations commission.

423.234 Delegates; selection; notice.

Sec. 4. Within 10 days thereafter, the employer shall choose a delegate and the employees' designated or selected exclusive collective bargaining representative, or if none, their previously designated representative in the prior mediation and fact-finding procedures, shall choose a delegate to a panel of arbitration as provided in this act. The employer and employees shall forthwith advise the other and the mediation board of their selections.

423.235 Selection and designation of impartial arbitrator or chairman of arbitration panel; Michigan employment relations commission panel of arbitrators; appointment, terms, qualifications, and removal of members.

Sec. 5. (1) Within 7 days of a request from 1 or both parties, the employment relations commission shall select from its panel of arbitrators, as provided in subsection (2), 3 persons as nominees for impartial arbitrator or chairman of the arbitration panel. Within 5 days after the selection each party may peremptorily strike the name of 1 of the nominees. Within 7 days after this 5-day period, the commission shall designate 1

of the remaining nominees as the impartial arbitrator or chairman of the arbitration panel.

(2) The employment relations commission shall establish and appoint a panel of arbitrators, who shall be known as the Michigan employment relations commission panel of arbitrators. The commission shall appoint members for indefinite terms. Members shall be impartial, competent and reputable citizens of the United States and residents of the state, and shall qualify by taking and subscribing the constitutional oath or affirmation of office. The commission may at any time appoint additional members to the panel of arbitrators, and may remove existing members without cause.

423.236 Arbitrator; duties; hearing; intervenors; evidence; record; expenses; actions and rulings.

Sec. 6. Upon the appointment of the arbitrator, he shall proceed to act as chairman of the panel of arbitration, call a hearing, to begin within 15 days and give reasonable notice of the time and place of the hearing. The chairman shall preside over the hearing and shall take testimony. Upon application and for good cause shown, and upon such terms and conditions as are just, a person, labor organization, or governmental unit having a substantial interest therein may be granted leave to intervene by the arbitration panel. Any oral or documentary evidence and other data deemed relevant by the arbitration panel may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired. A verbatim record of the proceedings shall be made and the arbitrator shall arrange for the necessary recording service. Transcripts may be ordered at the expense of the party ordering them but the transcripts shall not be necessary for a decision by the arbitration panel. The expense of the proceedings, including a fee to the chairman, established in advance by the labor mediation board

shall be borne equally by each of the parties to the dispute and the state. The delegates, if public officers or employees, shall continue on the payroll of the public employer at their usual rate of pay. The hearing conducted by the arbitration panel may be adjourned from time to time, but, unless otherwise agreed by the parties, shall be concluded within 30 days of the time of its commencement. Its majority actions and rulings shall constitute the actions and rulings of the arbitration panel.

423.237 Oaths; subpoenas; failure to obey, contempt of court.

Sec. 7. The arbitration panel may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as may be deemed by it material to a just determination of the issues in dispute, and for such purpose may issue subpoenas. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party or attorney is guilty of any contempt while in attendance at any hearing, the arbitration panel may, or the attorney general if requested shall, invoke the aid of any circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. Any failure to obey the order may be punished by the court as contempt.

423.237a Remanding dispute for further collective bargaining.

Sec. 7a. At any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed 3 weeks. If the dispute is remanded for further collective bargaining the time provisions of this act shall be extended for a time period equal to that of the remand. The

chariman of the panel of arbitration shall notify the employment relations commission of the remand.

423.238 Identification of economic issues in dispute; submission and adoption of settlement offers; findings, opinion, and order.

Sec. 8. At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973.

423.239 Findings and orders; factors considered.

Sec. 9. Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or

amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparisons of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

423.240 Majority decision of arbitration panel final and binding; enforcement; effect of new municipal fiscal year; awarding increased rates or benefits retroactively; amending or modifying award of arbitration.

Sec. 10. A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside. The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration.

423.241 Violation of lawful enforcement order; penalty.

Sec. 11. Where an employee organization recognized pursuant to Act No. 336 of the Public Acts of 1947, as amended, as the bargaining representative of employees subject to this act, willfully disobeys a lawful order of enforcement by a circuit court pursuant to section 10, or willfully encourages or offers resistance to such order, whether by a strike or otherwise, the punishment for each day that such contempt persists, may be a fine fixed in the discretion of the court in an amount not to exceed $250.00 per day. Where an employer, as that term is defined by Act No. 336 of the Public Acts of 1947, as

amended, willfully disobeys a lawful order of enforcement by the circuit court or willfully encourages or offers resistance to such order, the punishment for each day that such contempt persists may be a fine, fixed at the discretion of the court, an amount not to exceed $250.00 per day to be assessed against the employer.

423.242 Judicial review; scope; stay.

Sec. 12. Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the arbitration panel.

423.243 Existing conditions; continuance, change.

Sec. 13. During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.

423.244 Act supplementary.

Sec. 14. This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions; but any provisions thereof requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act.

423.246 Violations of act; imprisonment prohibited.

Sec. 16. No person shall be sentenced to a term of imprisonment for any violation of the provisions of this act or an order of the arbitration panel.

423.247 Effective date.

Sec. 17. This act shall become effective on October 1, 1969.

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CLERK

No. 83-551

In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, ET AL., PETITIONERS

v.

CITY OF DETROIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The Attorney General has primary responsibility for the enforcement of Title VII's prohibition against various forms of discrimination, including racial discrimination, in the area of public employment. 42 U.S.C. 2000e-5(f)(1), 2000h-2. This Court's resolution of the broad issue presented in this case, viz., the validity of a racial quota for promotions voluntarily adopted by a municipal police department in response to past hiring and promotion discrimination by the department, will have a significant effect on these responsibilities. The Court's resolution of the constitutional questions presented also could more generally affect the government's civil rights enforcement responsibilities. Indeed, the Attorney General previously certified this case to be of general public importance and moved unsuccessfully to intervene in the case, pursuant to Sections

706(f)(1) and 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1); 2000h-2, after the panel decision of the court of appeals.

STATEMENT

1. One of the responsibilities of the Detroit Board of Police Commissioners (Board) is to decide how and on what basis all promotions, including those from sergeant to lieutenant, are made (Pet. App. 149a). The City has long used a merit selection system for promotions; prior to 1974, all candidates for promotion were ranked on a single list according to numerical ratings based on various factors, including individual scores on a written examination (*id.* at 4a).[1] Promotions were made in rank order from the list of candidates. Pursuant to this system the percentage of black lieutenants in 1967 was 1.3% (two of 158). *Id.* at 105a. After the well-known riots in Detroit in 1967, the Department undertook a vigorous recruiting effort to increase the number of blacks throughout the Department. By 1974, the percentage of black lieutenants had risen to 4.8% (11 of 219). *Id.* at 123a-124a.

In 1974, the Board, after conducting two days of public hearings, adopted a race-conscious "affirmative action plan" for promotions in order to remedy the Department's prior discriminatory employment practices and to meet what the Board perceived to be an "operational need" for more black officers. The plan, as it related to promotions from the rank of sergeant to lieutenant, was as follows (Pet. App. 4a; footnote omitted):

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[1]The other criteria that contributed to a candidate's overall score were length of service, service ratings by superiors, college education, veterans' preference and an oral interview (Pet. App. 4a n.11).

The affirmative action plan does not alter the basic criteria for determining promotion eligibility, nor does it alter the minimum requirements necessary for consideration for the rank of lieutenant. The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternately from each list so that white and black officers are promoted in equal numbers. This 50/50 plan is to remain in effect until fifty percent of the lieutenant corps is black, an event estimated to occur in 1990.

2. In November 1975, petitioners, five white police sergeants who were passed over for promotions on the 1975 promotion eligibility list and the Detroit Lieutenants and Sergeants Association, the union for the officers, instituted the instant suit as a class action in state court against, inter alia, the City of Detroit, the Board, Mayor Coleman Young, and other municipal officials. The defendants removed the suit to the United States District Court for the Eastern District of Michigan. Petitioners' amended complaint alleged that the one-to-one racial quota for promotions to lieutenant violated Titles VI and VII of the 1964 Civil Rights Act (42 U.S.C. (& Supp. V) 2000d *et seq.* and 2000e *et seq.*), 42 U.S.C. (& Supp. V) 1981 and 1983, and the Fourteenth Amendment.[2]

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[2]Petitioners also alleged that the City violated the collective bargaining agreement with the Union, which incorporated the City's Charter provision requiring promotions to be made solely on the basis of competitive examinations, and therefore the plan violated Michigan law. Because the district court concluded that the affirmative action plan of the City was not only permissible under federal law but also was mandatory in light of its findings of past discrimination, it had no basis for considering petitioners' pendent state law claim. Although that part of the district court's judgment that pretermitted its consideration of the state law claims eventually was vacated by the court of appeals (see page 7, *infra*), that court did not resolve the state law part of the case.

After an extensive trial, the district court entered judgment for the City and its officials (Pet. App. 85a-254a). The court first found that the Department had been guilty of past hiring and promotion discrimination against blacks; there had been intentional discrimination between 1943 and 1967 and after 1967 the City's promotion system, primarily because of its continued use of a non-job related examination, had a disparate impact on blacks (Pet. App. 123a-137a). Against this background the district court considered petitioners' Title VII claim.[3]

Finding that the Board's one-to-one promotion quota satisfied all the requirements for a permissible affirmative action plan outlined by this Court in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the district court held that the promotion quota did not violate Title VII. Indeed, noting the City's use of unvalidated and discriminatory hiring and promotion tests until 1974, the district court held that "*Weber* aside, the affirmative action plan is justifiable to remedy clear violations of Title VII which continued into 1972 and 1973." Pet. App. 201a.

The district court also rejected petitioners' constitutional challenge. The court determined that the promotion quota was a "reasonable" effort to remedy the present effects of the City's past intentional employment discrimination, which did not cease until about 1967, when the minority recruitment program was instituted by the Department. Pet. App. 199a-216a.[4]

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[3]The court stated that petitioners' claim under Section 1981 was coextensive with their Title VII claim and their claims under Title VI and Section 1983 were coextensive with the constitutional challenge (Pet. App. 185a-186a). Petitioners have not challenged these conclusions.

[4]The district court also upheld the City's contention that "effective law enforcement required that the Police Department at all ranks roughly reflect the population which it serves" (*id.* at 218a) and thus

In a separate opinion, the district court incorporated the Board's affirmative action plan, including the promotion quota for lieutenants, into a final and mandatory judicial decree. Likening the voluntary plan to a consent decree, the court determined that the plan should be incorporated into a judicial decree (1) to insulate the plan from further attacks and (2) to ensure that the City maintained its affirmative action efforts, which the court held were constitutionally required. Pet. App. 242a-247a.

3. The court of appeals, with three separate opinions, affirmed (Pet. App 1a-45a). Noting that "what is valid under [the Fourteenth Amendment] will certainly pass muster under Title VII" (*id.* at 13a), the opinion of the court focused solely on the constitutionality of the Board's promotion quota. The court reasoned that its constitutional analysis was governed by the Sixth Circuit's earlier decision in *Detroit Police Officers Ass'n* v. *Young*, 608 F.2d 671 (1979), cert. denied, 452 U.S. 938 (1981), which upheld a one-to-one racial quota for promoting Detroit police patrolmen to the rank of sergeant (Pet. App. 10a & n.26). Adopting the standard of judicial review outlined in the opinion of Justices Brennan, White, Marshall, and Blackmun in *University of California Regents* v. *Bakke*, 438 U.S. 265, 336 (1978), the *Young* court and the court of appeals in this case determined that the substantial governmental interest in redressing the effects of past racial discrimination justifies race-conscious remedial measures so long as they are "reasonable." The reasonableness inquiry, according to

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concluded that the Department's "operational needs" justified imposition of the one-to-one promotion quota for lieutenants. In this regard, the court concluded that in light of the "history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis" (*id.* at 229a).

the court, requires an examination into whether any discrete group or individual is stigmatized by the racial classification and whether the racial classification is "reasonable in light of [the program's remedial] objectives." *Id.* at 13a, 20a.

Applying this standard to the instant case, the court of appeals concluded that the evidence amply supported the Board's and the district court's findings of past intentional employment discrimination against blacks in the Detroit Police Department. Furthermore, the court determined that the Board's promotion quota for lieutenants did not unduly stigmatize anyone (*id.* at 20a-23a) and passed the "test of reasonableness" (*id.* at 23a).[5] The court of appeals further found that to the extent the one-to-one quota is excessive as a remedy for past discrimination in employment, it can be justified as redress "to the black population [of Detroit] as a whole" for a prior "pattern of unconstitutional deprivation of the rights of a specific, identifiable segment of the Detroit population by white members of the segregated police department." *Id.* at 31a. Finally, the court affirmed the district court's entry of the Board's affirmative action plan as a mandatory judicial decree.[6]

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[5]The court's determination that the promotion quota was "reasonable" was based on its subsidiary conclusions that (1) the quota was "substantially related" to the objective of remedying past discrimination, (2) there were practical limitations on the effective use of other means to remedy past discrimination, (3) the quota was to terminate when its remedial objectives were fulfilled, and (4) the quota did not "unnecessarily trammel" the interests of white candidates for promotion to lieutenant since 50% of the promotions still went to whites (*id.* at 24a). The court expressly found it "unnecessary to address the validity of the operational needs defense to affirmative action in this context" (*id.* at 12a n.30).

[6]Judge Celebrezze concurred in the result only, finding the case governed by the constitutional analysis enunciated in *Young* (Pet. App. 42a). Judge Merritt concurred in the court's application of its constitutional analysis, but dissented from, among other things, affirmance of

4. On April 29, 1983, the United States sought leave to intervene as a party appellant and to file a petition for rehearing in which the United States argued, inter alia, that the Board's adoption of a one-to-one promotion quota violated the equal protection guaranty of the Fourteenth Amendment and that the incorporation of the Board's quota into a court order was inconsistent with the court's authority under Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g). The motion to intervene was denied, with Judge Merritt dissenting. Pet. App. 47a-50a. The court also denied petitioner's petition for rehearing, but, in so doing, the court vacated that part of the district court's final order incorporating the quota into a judicial decree. The court also remanded the case to the district court for further consideration of the 50% quota in light of 1980 census data showing that Detroit now has a 63% black population. *Id.* at 77a-78a.[7]

DISCUSSION

The sensitiveness of the issues presented in this case is readily apparent. The City of Detroit has unilaterally modified an otherwise apparently reasonable merit promotion system that had been bargained for collectively and has declared that fully half of all individuals promoted should be selected not solely on the basis of their measured ability but rather pursuant to an explicit racial criterion. We do not believe that this action can be sustained under the relevant statutes; nor do we believe that the City's decision here can be squared with the Constitution—notwithstanding the fact that the City's action was expressly made as a response to

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the district court's incorporation of the Board's affirmative action plan into a judicial decree. *Id.* at 43a-45a.

[7]Judge Wellford dissented from the denial of rehearing en banc, because the panel "inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool" (Pet. App. 79a).

undeniable past discrimination against blacks that had created a police force that was largely unresponsive to the concerns of a substantial portion of the City's population.

The courts below in grappling with this case labored under a serious handicap; this Court has heretofore, in its first three "reverse discrimination" decisions, not agreed on broad principles to guide the lower courts in resolving such cases. Moreover, none of the prior cases before this Court presented a setting comparable to this one and thus the specific reasoning and decisions in those cases did little to assist the courts below in reaching their results. For example, unlike the situation in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the plan here was adopted to remedy actual discrimination by the institution involved; but, unlike the "Harvard plan" discussed by Justice Powell in *Bakke*, the plan here gave an absolute preference based on race, instead of using race solely as one factor in choosing which candidates to promote (compare 438 U.S. at 307-310, 315-319). Similarly, unlike *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this case involves a public rather than a private employer and the plan it adopted allegedly contravenes a collectively bargained for merit promotion system. Finally, unlike *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), this case concerns a quota with a potential life span exceeding ten years that was adopted in the context of public employment and by a municipality rather than by Congress.[8] Whether all or some of these

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[8]Nor is it likely that the Court's decision in *Stotts* v. *Memphis Fire Department*, No. 82-229, will make clear precisely how this case should be decided. *Stotts* involves a district court's remedial authority under Title VII and a consent decree to prohibit a City from conducting layoffs and demotions according to seniority and to order that layoffs be conducted by race in order to guarantee that the percentage of blacks hired and promoted under an affirmative action plan will not be reduced. While a decision by the Court on the merits in *Stotts* may well provide some illumination of the issues presented here, the cases are sufficiently dissimilar that review here would seem warranted whatever the outcome of *Stotts*.

factors should affect the proper disposition of this case is a matter that should be resolved by this Court. Moreover, this case comes before this Court after a full trial and final judgment, and with no justiciability issues that might cloud its final disposition. Compare *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP*, No. 82-185 (May 16, 1983); *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105 (1981); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). In sum, this case presents an appropriate occasion for the Court to attempt to reach some consensus on the proper approach to cases involving the adoption by the government of quotas for employment. There is an obvious public interest and importance in providing guidance for governmental entities which, like Detroit, may have engaged in past discrimination, but would prefer to avoid litigation by adopting voluntarily their own remedial plan.

As is evident from our participation in the court of appeals, the United States is of the view that the judgment below was erroneous. We are concerned about the adoption of race-conscious, non-victim-specific remedies, particularly by any institution other than Congress. We have profound doubts whether the Constitution permits governments to adopt remedies involving racial quotas to benefit persons who are not themselves the victims of discrimination—at least in the absence of a clear statement by Congress itself, acting pursuant to its broad remedial authority under the Thirteenth and Fourteenth Amendments, requiring the use of such remedies. See *Fullilove* v. *Klutznick, supra*; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-444 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 656-658 (1966); cf. *Kent* v. *Dulles*, 357 U.S. 116, 130 (1958). We also have serious doubts about the validity of the unilateral adoption of a quota in place of a merit system in apparent disregard of the approval Congress expressed for merit systems in Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h);

and we are troubled by the City's intention to retain its quota until the percentage of black lieutenants equals the percentage of blacks in Detroit, even though that may be an artificial goal that needlessly disadvantages innocent non-black persons and could take two decades to achieve. Should the Court grant the petition, the United States would attempt to address these issues fully, in light of prior decisions and government practice and available indicia of congressional intent. In our view, this case provides an excellent vehicle for addressing important and recurring issues that so far have evaded clear resolution by this Court and the lower courts, and there is a pressing public need for whatever clarification can be achieved. Accordingly, we respectfully submit that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

DECEMBER 1983

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